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COOPERATIVE INSTREAM FLOW SERVICE GROUP

PROTECTING INSTREAM FLOWS UNDER WESTERN WATER LAW---SELECTED PAPERS

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COOPERATIVE INSTREAM FLOW SERVICE GROUP

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While the Fish and Wildlife Service is providing the initiative and leadership, the IFG is conceived as a multi-agency, multi-disciplinary program which is to become a "center of activity," providing a focus for the increasing importance of instream flow assessments.

The multi-agency, multi-disciplinary nature of the group is provided through the Intergovernmental Personnel Act transfer of state personnel, and details from other Federal agencies.

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Protecting Instream Flows Under Western Water Laws: Selected Papers

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PREFACE

The papers presented in this publication are the product of a panel on "Protection of Instream Flow Under Western Water Law." This panel was part of the program of the Western Association of State Game and Fish Commissioners and the Western Division, American Fisheries Society Annual Meeting held in Tucson, Arizona, July 13, 1977. These papers cover three subjects: opportunities under current water law for protecting instream flows; the utility of equity law principles for protecting instream flows; and the future of western water law for protecting instream flows. In addition, there is an appendix which presents a matrix of all strategies for protecting instream flows which have been identified in a recent contract with the Western Energy and Land Use Team of the U.S. Fish and Wildlife Service. This matrix will be useful in discovering the statutory basis for strategies in the several states.

Readers of this publication should be advised that these suggested strategies are not developed as guidelines for specific action. Those who wish to employ these strategies should do so after consultation with counsel. Counsel can assist in evaluating strategies which can be useful in an individual case.

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PROTECTION OF INSTREAM FLOW UNDER WESTERN WATER LAW:

INTRODUCTION

by

Fred Eiserman

It is my pleasure and privilege to moderate the deliberations of this panel on protection of stream flows under western law. After 12 years of serious Federal water pollution control programs, and I use the period of 12 years because PL 89-234 (The Water Quality Act) became a law in 1965, we are slowly beginning to get our priorities in order especially out here in the West. We are finally getting the various Federal and State agencies, the public, and a whole lot of conservation groups of one sort and another to realize that the slogan, "We all need clean water" should have started out with the fact that we all need water and after that, we can get on with the business of cleaning it up. In Wyoming for example, in some cases, it is much easier and quite legal to dry up a stream rather than have your pollution problem wind up in court. This, I hope, in the not too distant future, is about to change. We will be hearing about the possibilities of these changes in this panel.

The legal system under which we operate is a method of control that is designed to achieve goals by seeking acceptance to a formal system of regulations. The formal means used to seek these goals relies on the philosophy of those individuals who promulgate the laws. For most of the various sub-divisions of our legal process, these philosophies are so thoroughly accepted that they are rarely mentioned. However, when we address attitudes toward ecosystems, there is for the most part an absence of commonly accepted philosophical direction for the development of a law system that addresses attitudes toward these ecosystems. The ethical relationship with our natural environment takes many directions. There are those who will exploit and those who would protect; and for most of us, we are some place in between these two poles. As a result, there has developed a number of inconsistent rules on the same subject, and the basis of an environmental law system has materialized rather slowly. As this system of law develops, the response for the political sector is often acrimonious. Attitudes are changing, however, and perhaps more rapidly in the last ten years than they have in the last 200 years of our existence as a nation. It wasn't too many years ago that the wilderness was to be conquered and exploited. Today we have a Wilderness Act and many areas set aside for the purpose of conserving this part of our heritage as a refuge for those who need some escape from our technological society.

As the concept of conservation developed, two general thoughts materialized. In one camp, the protectionist and in the other, use it but use it wisely. I believe that today within a framework of environmental law, we are moving forward with titles such as land use planning, multiple use, and restrictive use, etc. but as we all know, these labels can be used with equal ease by those representing an exploitation mentality as well as those who understand that man's well-being depends on the survival of the natural environment. I believe that a conservation doctrine promoting the basic principle of preserving the well-being of our planet, recognizing the rights of future generations is probably wiser than one which seeks ironclad rules that can be distorted. Once we recognize this right of future generations, we can no longer only talk of the riches that are provided by technology.

Society must govern technology to achieve a consistent national philosophy toward its natural resources. The question is whether man is really wise enough to upset beneficially the equilibrium of nature. We all realize that we cannot subscribe to a return to nature but we certainly can subscribe to the fact that living in harmony with nature is mandatory. This does not mean giving up of the advances that have been made through years of applied science. It does require social reconstruction and an ethical relationship of man to his environment.

It is obvious that our economic system can provide many personal gains by the exploitation of our environment. This as we all know makes the development and implementation of a legal mechanism to perpetuate our materialistic system and at the same time our habitat, an extremely difficult task. Without reference to these economic and the political relationships in the development of constraints which are designed to protect this environment, we are being naive. Realizing that these problems remain intertwined and discussing them as we are doing today will certainly move us in the direction of a sanely protected environment. By understanding existing legal structures and developing that legal change necessary to modify past and anticipated destruction, perhaps we might achieve a proper use of our technological know-how. Addressing the concerns of this panel, hopefully, the day is not too far off when a national ethic will develop on the value of water running in a river bed--a realization that a river or a stream is the most basic unit of an ecological system. If we are to maintain the integrity of our environment, we must start here. All this is not impossible, especially when we look back at our early philosophies and compare the changes that have taken place. It is to this continued awakening that we dedicate the deliberations of this panel.

PRESERVING INSTREAM FLOWS UNDER THE APPROPRIATION DOCTRINE--PROBLEMS AND POSSIBILITIES

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A few short years ago participants on a panel assigned the topic "Protecting Instream Flows under Western Water Law" would have concerned themselves almost exclusively with the appropriation doctrine. Why? Because for the most part the appropriation doctrine was western water law. Like the rest of the world, water law has become more complicated. Now in discussing any aspect of water law one must consider a number of additional subjects, including state and federal environmental and pollution legislation and, perhaps, most notably, the expanded role of the federal government under the reservation doctrine. Nevertheless, the appropriation doctrine remains the principal system by which western states allocate the use of water to private parties, and any discussion of water law in the western United States must afford it major attention.

The following discussion is divided into two major parts. The first is a broad overview of the fundamental attributes of the appropriation doctrine. It seems essential that one have a general understanding of the doctrine before considering its impact on any specific problem. This discussion will emphasize those aspects of the doctrine most likely to be of significance to preserving stream flows. Having laid the foundation in the first part, the second part concentrates on the problems and possibilities of preserving instream values under the appropriation doctrine.

Perhaps two warnings should be interjected at this point. First, the following discussion will necessarily be general and because of that everything that is said will not be true in all western states or in all situations. However, despite various differences, the doctrine is fairly homogeneous and hopefully nothing of fundamental importance will be lost by generalization. Second, as noted above, the resolution of water law problems often involves considerations in addition to the appropriation doctrine. Nevertheless, because of the limited scope of my assignment and because others will probably allude to some of these other problems, I shall concern myself almost exclusively with the appropriation doctrine.

THE APPROPRIATION DOCTRINE

1. Historical background. A brief examination of the origin of the appropriation doctrine and its eastern counterpart, the riparian doctrine, seems desirable. In water law, as in other areas, some knowledge of the conditions and circumstances surrounding the development of the law is helpful in understanding it. Furthermore, both doctrines are excellent examples of the capacity of the law to respond to the needs of the times.

The water law of England and the eastern states in the 19th century was the riparian doctrine. Simply stated, the English version of the doctrine provides that each person owning land along a stream is entitled to the flow of the stream "undiminished in quantity and quality." Although the eastern states modified the doctrine to provide that "reasonable use" could be made of the water in a stream, these states retained the two fundamental principles of the doctrine--(1) that ownership of land along a stream (riparian ownership) is essential to the existence of a water right and (2) each riparian owner has a equal right to make use of the stream, even if that right remains unexercised.

To those reared in the water-scarce American West, the riparian doctrine seems ridiculus since it appears to discourage water development. However, to the English and eastern Americans the doctrine was admirably suited to the conditions and the times. Both England and the eastern United States are humid regions where irrigation is unnecessary. Outside of domestic use, the primary need for water in these regions during the 19th century was to power mill wheels. By restricting those who could use water and the places where water could be used, the riparian system assured each mill owner that he would continue to receive the flow necessary to turn his mill wheel.

However, in the American West conditions were different. Initially the primary use of water was for working mines; later its use for irrigation became widespread. Both of these uses often required that water be conveyed substantial distances from the streams and consumed large portions of the water. Because of the scarcity of water there was often not enough to satisfy the needs of all those who desired to use it. In resolving disputes over the use of water the miners applied the same rule which they applied to the minerals they sought--first in time is first in right; that is, the rule of priority. Judicial recognition of this "miners' custom" occured in California as early as 1855 and blossomed into a full-fledged legal doctrine

in the historic case of Coffin v. Left Hand Ditch, decided by the Colorado Supreme Court in 1882. (Consequently, the appropriation doctrine is sometimes called the "Colorado Doctrine".)

Although California was an early leader in recognizing the appropriation doctrine, it later had second thoughts and concluded that riparian rights must also be recognized. Consequently, it evolved a system for recognizing both kinds of rights. A number of states (Nebraska, Kansas, Mississippi, North Dakota, South Dakota, Oklahoma, Oregon, Texas, and Washington) initially followed California's lead and adopted some version of the "California doctrine." However, the marriage of the two doctrines was not a happy one and, for the most part, these states have abrogated the riparian doctrine in favor of the appropriation doctrine.

Like the riparian doctrine, the appropriation doctrine has two fundamental principles--(1) first in time is first in right, i.e., priority and (2) beneficial use of water is the basis of the right. Thus, in contrast to the riparian doctrine, we see that beneficial use and not ownership of land is the basis of the water right, and priority in time and not equality of right governs when there are conflicting demands for water.

2. Priority. The concept of priority can best be scrutinized through an example. Assume one starts with a stream from which there are ten users of water. Each user initiated his use at a different time. The earliest user is assigned a priority of 1, and the last to initiate his use is assigned a priority of 10. During certain times of the year, or at least certain times of certain years, there is ample water in the stream for all and priority has no significance. However, during certain parts of the year the quantity of water in the stream is insufficient to meet the needs of all users. When this occurs the user having the lowest priority (i.e., the highest number) must curtail his use. If the supply is still insufficient, the person with the next lowest priority must stop using water. This process is continued until sufficient uses are eliminated to provide those with the highest priority (i.e., the earliest users) a quantity of water sufficient to satisfy their appropriations.

The effect of the rule of priority is clear. Water shortages fall entirely on those who last commenced using water, rather than being borne by all users. The seeming harshness of this has resulted in criticism of the appropriation doctrine. Yet it is this attribute which makes the doctrine so well suited to water scarce regions. Each potential user can examine the remaining supply and determine if it is sufficient for his needs.

If it is he may invest his capital and labor with the assurance that future users cannot deprive him of needed water. The ultimate result is to give to each user the certainty necessary to foster the development of water resources.

3. Elements of an appropriation. Typically the initiation of an appropriative water right is said to require the following steps:

1. The intent to appropriate water.

2. Notice to others of the appropriation.

3. Compliance with state prescribed formalities.

4. A diversion of water.

5. Application of the water to beneficial use.

The modern permit system (discussed later) makes satisfaction of the first two requirements automatic, since application for a permit evidences the intent of the appropriator and the granting of the permit provides notice to others of the appropriation. Satisfaction of the third requirement is simply a matter of following certain prescribed procedures and poses no unique problems for protecting instream values. However, the remaining two requirements can cause problems for minimum flow appropriations and are worthy of additional consideration.

The diversion requirement means exactly what it implies--that there must be a turning or taking of water from the stream. Since traditional uses of water normally require a taking of water from the stream, most of the past disputes have been technical in nature, involving such questions as whether allowing stock to drink from a stream or taking advantage of natural irrigation constituted an appropriation. (Cases have gone both ways on both issues!)

Prior to the advent of the permit system, the requirement may have served a useful purpose since the diversion works provided physical evidence of the intent to appropriate and gave notice to others that an appropriation was being made. Beyond this it is difficult to conceive of any purpose served by the requirement. Since the permit system provides a superior means for the satisfaction of both the notice and intent requirements, imposition of the diversion requirement no longer seems justified. Nevertheless, courts will occasionally use the requirement as a basis for denying an appropriation.

For example, as recently as 1972 the New Mexico Supreme Court refused to recognize an alleged appropriation based on natural irrigation because there had been no manmade diversion of water. The result in the case was undoubtedly correct, since it seems clear that the party seeking the appropriation had no real basis for claiming it and was merely attempting to obtain an early priority. However, the court could have better achieved its result by citing lack of intent and notice or abandonment of any previously existing right, all of which were amply demonstrated by the facts. Instead it imposed an artificial requirement which may return to haunt it in future cases.

On the other hand, the requirement of a beneficial use is not an artificial one. To the contrary, this is one of the cardinal principles of the appropriation doctrine, and is, in fact, the very basis of an appropriation. One simply has no right to use water unless the water is being put to a beneficial use. And, as a recent decision by the Wyoming Supreme Court indicates, if water is being put to a beneficial use, failure to satisfy other requirements with absolute precision may be overlooked.

In general, courts and legislatures have not attempted to define the term beneficial use, but have instead engaged in a process of cataloging specific use as beneficial or non-beneficial as challenges to the beneficial nature of the use have arisen. A good illustration of this process and of the concept of beneficial use is found in the 1913 case of Empire Water and Power Co. v. Cascade Town Co.

Cascade Town was (and perhaps still is) a resort town whose primary attractions were a waterfall, the luxuriant growth nurtured by spray from the fall, and gardens and grounds developed by the resort. The power company proposed to divert the water from the stream above the falls and run it through a turbine, thereby destroying the falls and depriving the resort of water. The trial court permanently enjoined the power company from its proposed activity. On appeal, the power company argued that the use of water by the Cascade Town Company was not beneficial and consequently was not entitled to protection. In deciding the case the United States Eighth Circuit Court of Appeals rejected the power company's contention that the use of water for rest and relaxation was not a beneficial use. Nevertheless, it concluded that the falls themselves did not constitute a beneficial use, stating "The state laws proceed upon more material lines." Finally, the court decided that irrigation of trees and other vegetation by the falls would be beneficial if this

was a reasonably efficient means of application. (Incidentally, the court held that a manmade diversion was unnecessary if nature accomplished the same result.) Thus, the use of water for rest and relaxation and to irrigate vegetation for parks was catalogued as beneficial, but its use for purely esthetic purposes was determined to be non-beneficial.

The requirement of a beneficial use has a number of important corollaries. The first of these is that the amount of water an appropriator is entitled to take is always limited by the amount which he can put to beneficial use. Similarly, he can only take water when he can put it to a beneficial use and those having rights junior to him may use the water whenever he cannot do so. Furthermore, all appropriators are prohibited from wasting water. While waste is a relative and imprecise concept, this rule means that the use cannot be significantly less efficient than other uses of a similar nature. Finally, the requirement for a beneficial use will result in the loss of a water right (by abandonment or forfeiture) if the right remains unused for too long a period of time.

4. Rights of junior appropriators. Several of the rights of a junior appropriator are obvious from the previous discussion. For example, a junior appropriator is entitled to water whenever it is not needed by an appropriator senior to him. Likewise, he can insist that a senior appropriator not take more water than his appropriation allows. Certainly these are the two most important rights. However, one other right of particular significance for the preservation of instream flows merits examination. This is the right of a party to prohibit any change in the stream conditions existing at the time his appropriation was initiated if the change would damage his appropriation.

This right is applicable when a senior appropriator wishes to make a change in the place of use or manner of use of a water right. (Contrary to popular conception a change in use or transfer is allowed in most states, although there may be a number of limitations on doing so.) In such a case the senior party can make the change only if it will not result in a change of stream conditions detrimental to junior appropriators. Typically, but not exclusively, detriment will occur because of increased consumption resulting from the new use.

Once again the matter can be best understood through an example. Assume we have two irrigators on a stream, the senior appropriator being the upstream party. The senior and junior

appropriations are for 10cfs and 5cfs respectively. Normally the stream has a flow of between 10cfs and 15cfs. Of the 10cfs diverted by the senior party 5cfs is consumed through transpiration, evaporation, seepage, etc. and the remaining 5cfs returns to the stream above the diversion point of the junior party. Under these conditions the junior party receives sufficient water to satisfy his entire appropriation whenever there is at least 10cfs in the stream, which is most of the time. However, the senior party proposes to sell his water right to a city located on an entirely different drainage. Obviously no part of any water diverted to the city will be available to the junior appropriator. Consequently, if the city were allowed to divert the full 10cfs constituting the senior party's appropriation, the junior party would be able to satisfy his entire appropriation only when the stream flow was 15cfs and would receive no water when the flow dropped to 10cfs. However, the city would be allowed to divert only 5cfs, since to allow a larger diversion would cause a detrimental change in the stream conditions which existed at the time the junior party initiated his appropriation. The significance of this rule of preserving instream flows will be discussed later.

5. Administration of water rights and the "public interest". In determining whether a person is entitled to use water at any given time it is not particularly helpful to simply know that he has a water right. In addition it is necessary to know how much water is available, how many senior rights exist, and how much water is required to satisfy those prior rights. When consideration is given to the fact that a particular stream or river system may extend for several hundred miles, with numerous tributaries, and may contain thousands of appropriations, the complexity of the situation is obvious. Someone must have the necessary information and authority if such a complex system is to function. This is the purpose of systems for the administration of water rights.

The central figure in most water administration systems is a designated public official or board, typically the state engineer. This official collects necessary information, maintains various records, and enforces the priority system. In order for the official to perform these functions it is essential that he have a record of all persons claiming an appropriation. Consequently, all western states, except Colorado, provide that it is unlawful to appropriate water without first obtaining a permit from the proper official. (Although Colorado does not require a permit it does provide that an appropriation does not receive a priority date until filed with the proper water clerk, thus providing a powerful incentive to file.)

State statutes usually provide that a state engineer may refuse to issue a permit for specified reasons, including a finding that the proposed appropriation is not in the "public interest" or "public welfare." (Idaho and Montana do not grant this authority.) These terms are imprecise. In fact, virtually all commentators on the subject have noted that there is no such thing as the public interest, just as there is no such thing as a single unified public. Instead, on most issues, there are a number of publics each seeking to advance its own interests and each believing that its interests are synonomous with those of the public. Certainly, where water use is concerned, it is easy to identify several well defined publics. There is the public of irrigation interests, the public of municipal and industrial water users, and the environmental and recreational public. Each of these publics believes its interests are paramount and deserving of protection.

It is probably the imprecision of the term which has caused most state engineers to construe the authority granted by the public interest provision quite narrowly. Traditionally they have limited their consideration to matters of economic efficiency (i.e., cost/benefit analysis) or to the effect of the proposed appropriation on existing uses or other pending applications. Actually there have been few instances where appropriations have been denied as not being in the public interest since in the past any use which was considered beneficial was generally considered to be in the public interest. Only with the rise of the environmental movement and the realization that there are certain public values, as opposed to private values, which can be found in a state's waters have challenges to proposed uses on the grounds of public interest become common.

PROBLEMS AND POSSIBILITIES

1. The instream flow appropriation. It seems desirable to begin the discussion of the problems and possibilities of protecting instream flows under the appropriation doctrine with an examination of how instream appropriations might function. This is not meant to suggest that instream appropriations are clearly recognized in all jurisdictions for in fact they are not. However, for the purposes of this section it will be assumed that instream appropriations are allowed.

To the extent that an instream appropriation is a senior appropriation, the system works simply and effectively to protect the flow. Whenever water levels drop below the quantity of the instream appropriation, uses junior to the instream

appropriation will be curtailed in order to maintain the appropriated flow. If the instream use were the number one appropriation on the stream, all other uses could be curtailed in order to maintain the flow, if necessary. If the instream flow is senior to some rights and junior to others, as might typically be the case, then the instream appropriation could require some, but not all, other uses to be terminated in order to protect its flow. And, of course, those uses senior to the instream flow could destroy that flow if necessary to satisfy their needs.

If an instream appropriation is an extremely junior appropriation, it might be asked whether there is any point in having an appropriation at all. That is, if the instream appropriation is so junior that seldom, if ever, will there be any water left after all rights senior to it are satisfied, does it serve any purpose to have an appropriation? Surprisingly, the answer in many cases is yes.

On many western streams the most senior appropriations are downstream and substantial flows are left in the stream to satisfy these appropriations. So long as these senior appropriations remain as they are, extensive portions of the stream receive the necessary minimum flows. If, however, one or more of these downstream senior appropriators decides to transfer his point of diversion upstream a substantial distance these minimum flows may be lost. It is at this point that the existence of a junior minimum flow appropriation becomes important. As was discussed in a preceeding section, a senior appropriator may not change his use if the change will cause detriment to junior appropriators. Here the instream appropriation may object to the change, since moving the diversion upstream will detrimentally injure it. In other words, the existence of an instream appropriation gives the person or body holding it standing to object to changes in use which will detrimentally change stream conditions on the portion of the stream for which the minimum flow appropriation is held.

It is apparently this type of reasoning which was behind the Colorado instream appropriation legislation. In 1973 the Colorado Legislature authorized the State Conservation Board to make minimum flow appropriations. Most streams in Colorado are heavily over-appropriated and at first glance it seems the authorization is a meaningless gesture. However, the primary motive is to give the Colorado Conservation Board standing to object to changes in use which would have a negative effect on instream flows.

Nor is this protection as insignificant as it may first appear. At present many new demands are being placed upon western water, primarily because of energy development and population growth. If these new demands are to be met, present patterns of water use will have to be altered. Water which is presently being used for agriculture will need to be changed to other uses. Very often these changes may be detrimental to the stream flows which presently exist, since they may involve changes in the place of use or place of diversion or increases in the rate of consumption. Having standing to object to these changes can be a right of real substance.

Once the minimum flow appropriation is recognized a number of potential strategies for preserving these flows come into existence. For example, a reservoir might be constructed to catch and store spring floodwaters which would then be released in water short periods of the year to maintain stream flows. Another possibility might be the use of a transbasin diversion to take water from streams having an overabundance of flows to those having a need for the water. Groundwater might be pumped during water short periods to augment stream flows. Or an upstream senior water right might be purchased and the flows which were previously taken from the stream left in it. The list could go on, for practically any scheme which has been used for other water development purposes may be used to preserve instream flows.

Many of the preceding suggestions may be expensive. It is costly to build dams, construct transbasin diversions, or purchase existing water rights. However, the real worth of instream values will be determined by how much money we are willing to spend to preserve them. Furthermore, a little ingenuity will often serve to reduce the costs. For example, the water released from the dam might be sold to someone who would take it from the stream at a downstream point where few instream values worth preserving exist, thereby defraying a part of the construction and operation costs of the dam. This same technique might be applied to all of the strategies suggested above. Since instream uses of water are essentially non-consumptive, the water remains available for more traditional uses at some less critical point. If projects for the preservation of instream values are integrated with other development projects, the possibilities for preserving instream values can be greatly expanded and the costs of doing so greatly reduced.

One other aspect of the instream flow appropriation which should be mentioned is the need for a different means of

identifying or designating the instream appropriation. Under existing practice the certificate of appropriation in most states identifies the point at which the diversion is being made. However, since an instream appropriation does not involve a diversion but rather an attempt to preserve flow in a stretch of a stream, a certificate for such an appropriation should make reference to two points on the stream -- the point at which the appropriation begins and the point at which it ends. The Colorado statutes authorizing instream appropriation recognize this need by providing for the appropriation of minimum flows "between specific points or levels for and on natural streams and lakes." This is merely a technical adjustment and is perhaps a minor point. Nevertheless, such a designation seems essential to give effect to instream appropriations and by clearly specifying the portion of the stream to be protected, numerous disputes can be avoided. Furthermore, its discussion here serves to illustrate the substantial difference between traditional uses of water and instream flow appropriations.

2. Technical objections to instream appropriations. The previous section began with the premise that instream appropriations are permissible. In reality there are a number of legal objections which may be raised to such appropriations. This section will examine some of these.

The requirement for a diversion is an obvious objection since instream appropriations by their very nature do not usually involve a diversion. Colorado River Water Conservation District v. Rocky Mountain Power Co., a 1965 decision of the Colorado Supreme Court, is illustrative of the problem. In that case the conservation district attempted to initiate appropriations for minimum flows on several streams, citing as its authority C.R.S. 1963, 150-7-5(10) which conferred upon it the power "To file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish . . ." In denying the appropriations the Colorado Supreme Court stated:

> There is no support in the law of this state for the proposition that a minimum flow of water may be "appropriated" in a natural stream for piscatorial purposes without diversion of any portion of the water "appropriated" from the natural course of the stream. By the enactment of C.R.S. 1963, 150-7-5(10) the legislature did not intend to bring about such an extreme departure from well established doctrine, and we hold that no such departure was brought about by said statute.

As in the Miranda case, the decision here might well have been correct since the conservation district sought to backdate its priority forty years, alleging various uses of the streams by the public (fishing, camping, etc) constituted an appropriation. It is doubtful that these acts were done with the intent to appropriate water and they certainly imparted no notice to others of an appropriation. The court might better have relied on these grounds for its denial rather than the diversion requirement, particularly since it offered no other explanation for the legislative intention in enacting the statute.

However, much as one may criticize the diversion requirement it remains a deeply ingrained part of the doctrine and presents a serious obstacle to instream appropriation. One way to eliminate the obstacle is for the legislature of a state to statutorily declare that the diversion requirement has no validity, at least where minimum flow appropriations are involved. This is precisely what the Colorado legislature did following the Colorado River Conservation District case. In 1973 it enacted legislation authorizing instream appropriation by the Colorado Conservation Board and made it absolutely clear that a physical diversion was not necessary.

In an effort to defeat this sort of legislation it is sometimes argued that the constitution of a particular state requires a diversion and, thus, the legislature has no power to eliminate the requirement. The basis for this argument is found in language of the constitutions of several western states referring to the "right to divert" the unappropriated waters of the state. The Idaho Supreme Court rejected such an argument in State Department of Parks v. Idaho Department of Water Administration. In a concurring opinion one justice suggested that the purpose of the phrase was not to make a diversion mandatory, but rather to make it clear that the appropriation doctrine and not the riparian doctrine was the law in Idaho. This interpretation seems reasonable and hopefully other courts will be inclined to follow it.

An objection closely related to the diversion requirement is the assertion that instream appropriations are riparian in nature. The principal case for this view is the United States Supreme Court decision of Schodde v. Twin Falls Land and Water Co. The case arose in Idaho and involved a claim for damages resulting from a government dam which backed water up against the waterwheels used by an individual to lift water for his diversion. Essentially, the Supreme Court declared that the claim of the individual to the entire flow of the

river was riparian in nature and not permissible in an appropriation state. Actually the case can better be viewed as a prohibition against waste, since the water wheels required the entire flow of the river to effectuate a small diversion. So viewed the opinion is really not adverse to reasonable instream appropriation. Nevertheless, the diversion of water and its use away from the stream is one of the primary distinctions between the appropriation doctrine and the riparian doctrine. Any use of water not involving a diversion is likely to meet with a challenge that it is in reality a riparian claim.

The requirement of a beneficial use may also create difficulties. Opponents of instream uses will allege that such uses are not beneficial. This allegation is not without a degree of support from past cases. You may recall, for example, that the court in Empire Water and Power Co. v. Cascade Town Company found that the preservation of a waterfall was not a beneficial use of water, despite the fact that the waterfall was the primary attraction of the resort. When the court in that case said with regard to preserving the falls "The state laws proceed upon more material lines" it was expressing the pioneer view that "water is to work with, not to play with." Certainly at the time the appropriation doctrine was developing exploitation of natural resources was the prevailing attitude. It is not surprising then that only uses of water which were exploitative were viewed as beneficial.

In addition the beneficial use requirement is at least partially an anti-monopolistic provision, intended to reject the oligopolistic character of the riparian doctrine which limits the use of water to those owning land along the stream. By restricting the right to use water to the amount which can be efficiently exploited, the beneficial use requirement makes the remainder of the stream available to others. Since it is difficult to determine the flow essential to properly preserve various instream values, it is possible to lay claim to large amounts of water under an instream appropriation. This gives rise to the fear that instream uses will monopolize a given water source and, thus, ought not to be considered beneficial. If instream appropriations are properly restricted this fear is unfounded; nevertheless, the fear remains.

In any case, attitudes and legal rules do change. Even the court in the Empire case recognized that the use of water for rest and relaxation was beneficial. Similarly, while the beneficial nature of recreational uses of water would once have been hotly debated, such uses are now generally recognized and

are often listed among the values of traditional water projects. Full recognition of instream uses as beneficial would seem to be merely the next step in the evolution of the concept. This was essentially the response in State Department of Parks to the argument that an Idaho statute declaring the preservation of water in the Malad Canyon for its "scenic beauty and recreational purposes" to be of beneficial use was invalid because such uses were not among those listed in the Idaho constitution. The Idaho Supreme Court found that the constitutional list was not exclusive and concluded "the use of water for providing recreational and esthetic pleasures represents an emerging recognition in this and other states of social values and benefits from the use of water."

One way to defuse the beneficial use argument is for the legislature to expressly declare instream uses to be beneficial as was done by the Idaho legislature in the statute under attack in the preceding case. However, since the Idaho statute only applied to Malad Canyon it cannot be taken as a general recognition that instream uses are beneficial in Idaho. In 1973 Colorado did enact a statute giving general recognition to the beneficial nature of instream uses. It did so by defining beneficial use to include appropriations by the state of "minimum flows . . . required to preserve the natural environment to a reasonable degree." In many jurisdictions, however, the question has never been directly answered by either the courts or the legislature and a challenge that the preservation of instream values is not a beneficial use remains a serious threat.

Corollaries of the beneficial use rule can also pose difficulties. For example, the prohibition against waste may precipitate a charge that a particular instream appropriation is excessive and wasteful. (Rumor has it that one instream appropriation has already been challenged on this basis.) Consequently, those claiming minimum flow appropriations should be prepared to justify the necessary flows on scientific and technical grounds.

3. The instream appropriator. This heading will consider those who should be allowed to make instream appropriations. Because two somewhat different situations are involved the following discussion is divided into two parts. The first of these examines who is an appropriate party when a new appropriation is being made (i.e., a claim is being made to previously unappropriated water) and the second examines the situation when an existing appropriation (such as an irrigation appropriation) is being transferred to an instream use.

When a new appropriation for instream uses is being made, strong grounds for requiring the appropriator to be a public body can be advanced. First, the decision to preserve instream flows involves balancing some very complex interests. The decision to withdraw a portion of water for instream uses obviously means that the water withdrawn will not be available for other important purposes. This is basically a resource allocation decision with important consequences and ought to be undertaken only after careful efforts have been made to determine that this is the best use for the water. Private parties with narrow self-interests cannot be expected to undertake the careful study and sensitive balancing required.

Furthermore, because many of the values involved defy economic quantification they can only be properly evaluated in the context of broad public decision making. For this reason, a persuasive argument can be made that large scale appropriations or withdrawals of water to preserve instream flows should be made only with legislative approval. Public agencies, like private individuals, have their biases, and perhaps only the legislature can provide a satisfactory forum in which diverse interests and needs can be focused and balanced. Although there is a good amount of scepticism of the political process, this is the means by which a democracy makes all its important decisions. I believe that if society really desires to protect instream values the legislative process will produce that result. In fact, the environmental record of the state and federal legislatures is not too bad, on balance.

Second, instream appropriations do not usually require the expenditure of time and money which operates to validate other appropriations. That is, it is the willingness of an appropriator to invest his time and financial resources in the diversion and use of water which demonstrate his sincerity and evidences that he wants the water for its value to him and not simply for speculative purposes or to deny others its use. The requirement of such expenditures as a condition to receiving public property is not unique to water law. The Mining Law of 1872 requires a miner to expend certain sums before taking his claim to patent and the various homestead laws all required that the entryman undertake developmental acts. Because instream appropriations do not make these demands there is no way of judging the value of the water to the appropriator or demonstrating his sincerity.

Third, instream values are essentially public values. Water is preserved so that the public may enjoy the beauty of

a waterfall, the thrill of rafting down a wild river, or the joy of catching a trout on a dry fly. These are not values to be captured by an individual for private gain, but values to preserve for public use. Consequently, it is appropriate that they be acquired and held by public bodies.

Thus, it seems clear that the initial appropriation or withdrawal of water to preserve instream flows should only be made by public bodies and all legislation which presently authorizes minimum flow appropriations places the authority to make such appropriations with the legislature or some other public body.

On the other hand, there seems to be no reason why a private individual or group should not be permitted to buy an existing water right, use the right purchased to maintain minimum flows, and in that way obtain an instream appropriation. Most of the objections which can be raised with regard to the previous situation are not present. There is no need to engage in a careful balancing process to determine if the instream use is a proper allocation of the water. The willingness of the private party to purchase the water right from the present owner proves that the instream use is indeed more valuable. This is simply a market solution to the allocation question, and those who would make traditional uses of water have little reason to complain if they are outbid in the marketplace.

Similarly there is no reason to doubt the sincerity of the instream appropriator. By placing his pocketbook on the line he has demonstrated that this use of water has value to him. The fact that others may share in the use does not affect the result. The situation appears little different from that in which a private individual makes land available for a public park.

It is interesting to speculate whether a private person holding or purchasing an appropriation could donate that appropriation to a qualified organization for the purpose of preserving instream flows and receive a charitable deduction under the Internal Revenue Code. At first glance there seems to be no reason why this could not be done. The ability to take a tax deduction would doubtless increase the occurrence of this practice.

The extent to which existing appropriations can be transferred to instream appropriations under state law is not at all clear. Undoubtedly, one can buy an appropriation and retire it from use. However, in most cases that would not benefit instream flows, since numerous junior appropriators would only claim the water. What is needed is a mechanism by which the

right purchased can be earmarked to preserve minimum flows between specified points. Unfortunately, at present this mechanism does not exist.

However, there is another means by which the same result might be obtained. An upstream senior right might be purchased and then resold to someone downstream. The water which was taken out upstream would then remain in the stream to satisfy the downstream appropriator. Intervening junior appropriators could not claim the water because it is required by the senior appropriator downstream. Thus, minimum flows would be preserved down to the new point of diversion.

4. Preserving instream values by the denial of additional appropriations under the "public interest" standard. In some cases streams may presently have unappropriated water and minimum flows may be sufficient. The danger is that additional new appropriation may further diminish the flow. One means of preventing this would be for the state engineer to refuse additional permits on the grounds they are not in the public interest because of their effect on minimum flows. To the uninitiated this seems like a plausible possibility. However, as noted earlier, state engineers have tended to view their authority under this standard very narrowly and many would assert it did not apply to the protection of instream values. Nevertheless, recent events give reason to be optimistic.

The argument of public administrators that they cannot consider the environmental effect of their actions under public interest standards is not a new one. In fact, it was precisely this sort of argument by federal agencies which gave use to the National Environmental Policy Act (NEPA). That act now directs almost all federal agencies to consider the environmental effect of actions taken by them, thereby foreclosing any claim that they have no authority to consider these effects. NEPA only applies to actions of federal agencies and thus would not apply to decisions by state authorities which issue permits to appropriate water, although it could clearly have an effect on federally built or financed water projects. However, a number of states have passed environmental policy acts which require similar considerations of state agencies.

Stemple v. Department of Water Resources, decided by the Washington Supreme Court in 1973, is a good example. In that case an application to appropriate water from a lake was filed. A number of existing water users objected to the issuance of the permit because of possible pollution and health problems

which further withdrawals might cause. The Department of Water Resources, citing a previous Washington decision for authority, contended that the statutory provision giving it the authority to deny permits if the appropriation would "detrimentally effect the public welfare" gave it no authority to consider pollution effects. Rather it argued the state's water code was concerned with distribution of water and the quoted phrase only related to withdrawal and not pollution or health concerns. However, the Washington Supreme Court noted the passage of the Washington Environmental Policy Act and rejected the Board's contention, stating: "Environmental protection has thus become a mandate to every state and local agency and department."

Alaska has utilized a different approach to making sure instream values are considered in deciding whether a proposed appropriation is in the public interest. Its statutes state that in determining the public interest the commissioner shall consider "the effect on fish and game resources and on public recreational opportunities."

A number of states have neither environmental policy acts nor statutes like Alaska's. One can only hope those charged with making water decisions will take a broader view of their authority, particularly in light of present concerns about the environment.

Perhaps it should be noted that the power to deny permits necessarily includes the power to condition them. Thus, in approving a permit to appropriate water conditions to protect instream values could be included. For example, in granting a permit for a reservoir a requirement for sufficient releases of water to maintain minimum flows might be specified. The California Water Resources Control Board has used such devices to preserve minimum flows, in one case requiring the maintenance of flows in excess of those which would have occurred had the particular project not been built. Likewise, the Federal Power Commission has required minimum flow release in its licensing of hydro-electric power projects.

5. Reservation of minimum flows v. appropriation. Instead of making an appropriation for instream purposes a state can reserve or withdraw specified flows from appropriation by others. That is, the state simply makes a quantity of water unavailable for appropriation. This technique is similar to the refusal of a state engineer to issue additional appropriation permits because of the effect on instream values. Here, instead of relying on the application of the "public interest"

standard by the state engineer, the legislature or an agency designated by the legislature makes a formal reservation of water on particular rivers, streams, or lakes.

Examples of this technique can be found in Washington and Oregon. In 1915 the Oregon legislature withdrew 23 streams along the Columbia River from appropriation in order to preserve their waterfalls. Numerous other legislative withdrawals have occurred in Oregon over the years. A 1969 Washington statute authorizes the Department of Water Resources to establish minimum flows or levels on streams and lakes "for the purpose of protecting fish, game, birds, or other wildlife resources, or recreational or esthetic values. . ." Variations of these techniques can be found in other states.

Reservation of water is the functional equivalent of an appropriation of instream flows by the state and there seems to be little reason to prefer one approach over the other. (Although occasionally a confused judge may feel it is legally acceptable for the state to use one technique but not the other.) Personally the reservation approach has always seemed preferable, since it appears a bit ridiculus for the state to appropriate water from itself. On the other hand, the appropriation device may be politically more acceptable because use of the established system creates less uncertainty in the minds of existing appropriators.

Conclusion

Those charged with preserving instream values sometimes feel the appropriation doctrine imposes impossible barriers. While it is true that the doctrine occasionally creates problems, with a minor amount of tinkering it can be made to protect instream flows. The real challenge is to convince the courts, the legislature, and the public that there are instream values worth preserving. When this is done the necessary modification will follow. The record already indicates a modest degree of success and although the battle is not yet won there is reason to be hopeful.

UTILITY OF EQUITY LAW FOR PRESERVING INSTREAM FLOWS

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Equity Law is something like weather, everybody talks about it but no one does anything about it. Perhaps modifying existing water allocation processes with equity is similar in difficulty to modifying weather. The application of equitable principles is usually not easy. Tradition has been to follow the established statutory and case law. And while all law schools teach courses in Equity, they emphasize the statutes, and court ruling precedents based upon statutes; they stress written law as precedent for all human behavior.

Precedent determines the outcomes of decisions now and in the future. This is called the doctrine of stare decisis. Lawyers are basically steeped in it and of course the courts are too. Courts usually rely on precedent for decisions. The fact that established law and precedent violates all social principles of the current time does not deter the lawyers and courts from using stare decisis. They prefer to leave abrupt changes to the legislative branch.

Equity means fairness and justice. It had its origin when the laws were made by edicts of oppressive kings. The ecclesiastical courts emanating from the churches were clothed with great powers, particularly by Queen Elizabeth of England in the 16th century. They decided cases on the basis of equity when it was found that the laws of the kings did not provide adequate remedies for the people. We have a real parallel today when we view many state statutes, particularly regarding the environment.

Many legislatures are not inclined to make laws to preserve instream flows. When priority rights for out-of-stream uses are established under existing laws, the damages sustained by streams are often irreparable. When it is seen that important public interests are being lost and destroyed by over appropriation of streams under the priority for private use concept in western water law, it becomes obvious that there is an inadequacy of legal remedy. This is a ground for bringing a suit under the principles of equity. If these public values are to be saved, equity has to do it because the principles of stare decisis will not.

The distinction between the words "law" and "equity" may be somewhat confusing. Perhaps a good way to promote understanding is to point to the historic maxim that said equity is a court of conscience doing that which ought to be done, notwithstanding statutes to the contrary. Historically law and equity were two different court systems, but today the same courts administer both arms of

jurisprudence with both a law function and an equity function in the same court.

Injunctive remedy, in fact, is typically a function of the equity arm of the court in which there is not a right to jury trial. A judge administering an equity proceeding really has a higher stature and it is recognized that the distinctions between law and equity place a higher and more refined burden on doing the justice of conscience. This is so because it takes the learned capabilities of a judge even on questions of fact that are the usual province of a jury in law cases.

Divorce law is perhaps the most common application of equity. Divorce has become a common event and juries are not used in divorce cases; the judges apply broad equitable principles so that the justice of good conscience is done.

Assuming we understand the concept of equity let's move to the nuts and bolts of instream flows. There is a tremendous body of equity law. We have many cases decided by judges acting on the law of conscience doing what ought to be done in given factual situations where the statutory, case, and administrative laws were shown to be inadequate, and something needs to be done to protect important rights. Even so, there are precious few if any cases that have exercised the equity right of the people to have their streams contain minimum flows necessary to keep the fish and wildlife dependent thereon available to them. The point is that the opportunity exists to pursue this course of action.

It is my opinion that the potential has scarcely been touched. The diversionary users of our waters for agriculture have already destroyed fish and wildlife viability in many of our public streams, and today the fight is over remnants. This only raises the principle of equity more clearly. If any semblance of a quality of life is to be retained, as has been so well articulated by Secretary of the Interior Cecil D. Andrus, something forceful has to be done about preserving instream flows. Equity law is one approach. In order to achieve results a monumental task must be contemplated. The responsibility for this rests with government-paid lawyers. Government lawyers should advocate the public interest in instream flows with a zeal comparable to Bureau of Reclamation engineers who get the waters diverted to agriculture in the old tradition. Fortunately, I see cause for new hope in the announced policies of the Bureau of Reclamation to start engineering for fish and wildlife. This would serve a greater public interest than their previous all-agricultural thrust. There can be no question that fish and wildlife resources are valued higher today than they ever have been. The principal reason is that we are dealing with remnant fish and wildlife resources in so many situations. It has gotten to the place that most Americans

have to satisfy their enjoyment of fish and wildlife resources vicariously. This too adds to a plea for fairness and justice which is inherent in the poeples' desire to gain genuine, wholesome outdoor experiences near their home. Adequate instream flow and water quality are essential elements in this experience which requires and deserves protection.

What is needed is a cogent definition of the public interest, and one answer to the question--who should properly advocate that public interest? This is probably the most confused area of all, and contains more myths, smoke screens, dodges, and "let George do it" policies than anything else. However, in our system of government we have vast numbers of people on public payrolls that are theoretically employed to represent the public interest. The statutes and the case law are replete with reference to the function of government being to serve the public interest. The courts come down hard on this principle when there is conflict between private versus public interest. Nothing gets more lip service, and less real service than public interest. The practical reason that little gets done is because of the leverage and the level of effort which is applied by those wanting to carve private self interest out of the public sector. This is especially true in matters of natural resource use, particularly water use. The public has little or no coordinated advocacy through the administrative processes making it possible for private interests to be accommodated at the expense of the public interest.

Of course it can be contended that the economic and social spin-off of permitting diversion of all of our water from a stream to grow crops at the expense of public resources dependent upon reasonable instream flows, is in the public interest. But this contention in most cases is doomed to failure because it cannot satisfy the principle of equity inherent in the publics' interest in the use of waters. I appreciate that this collides with the priority doctrine of rights to use water by appropriation and diversion. But the point is that equity cannot be sustained by private diversion of public waters to the reduction of stream flow resulting in destruction of the fish and wildlife resources dependent upon sufficient water. This is where the traditional law of water rights and the law of equity reach an impasse. And this is the point where the law of equity is capable and available to do that which ought to be done; i.e., where there is both inadequacy of law and irreparable injury.

The politics of initiating such litigation would be extremely difficult, even though an equitable remedy exists in law. But if we do not start working towards it we are never going to get there. Perhaps the most important thing is for those acting on behalf of the public interest in fish and wildlife to start talking about the use of equity law when they see a situation that needs correcting and when the statutory laws or administrative rules are inadequate.

The worst mistake we can make is to have faint heart and fold in the wake of the advice of stare decisis lawyers who point to an old statute and say preserving flows is against the law so it can't be done. They all know about the equity principles but few are willing to make the effort to make equity overrule the law. The laboring oar is just too hard for them to pull, and it is so much more comfortable to point to a statute and say, sorry it just can't be done, and the public interest just has to sustain the injury until the law may be changed by a legislative body. If we persist in thinking and talking about equity, that can change.

There is a new climate for environmental law and immense public sentiment for it. The advocates for industrial destruction of a quality environment really fear the law of equity. One of their best tools is to keep it quiet, and keep people thinking that all law comes from legislative bodies.

For example, I believe the 1872 Mining Laws could not withstand a competent equity attack in today's context of the absurdity of giving away the publics' land to persons who would claim them for their own private use just to see if they can produce minerals. It is not hard to imagine the immense defense efforts that would be made by the mining industries in a case to set aside the 1872 Mining Statutes, although it seems clear how little equitable sense they make today, a century beyond their enactment. This same equitable principle applies to instream flow needs for many public purposes including fish and wildlife. Stare decisis lawyers would quickly say this is a zany doctrine, but I believe the court in a properly advocated case would decide in favor of the public interest.

Of course, this would amount to a public taking of private water rights for which reasonable compensation must be paid under the well understood principles of eminent domain. Public values in fish and wildlife dependent upon reasonable instream flows are the kind of beneficial user over which eminent domain and condemnation should be exercised by government following an equity proceeding.

The Lemhi River in Idaho is a typical example. This stream supports a chinook salmon fishery which spawns in the Lemhi Valley above Salmon, Idaho, after they have migrated some 900 miles from the Pacific Ocean through the Columbia, Snake, and Salmon Rivers. It is a species of great stamina and quality. Many millions of dollars in public funds have been invested to preserve the salmon runs in this system. This resource is an important part of the special culture of the region. There are some old irrigation water rights on the Lemhi River that have appropriated more water than sometimes flows in short water years. The result is a decrease in the amount of water sufficient to sustain the viability of the spawning salmon. The merits of this situation would make a very good test case after

proper study to determine the reasonable instream flow needs. The necessary water rights could be acquired by government condemnation suit if acquisition negotiations failed.

The public values are eminently higher in this fishery than the private right to irrigate a few acres of alfalfa. The objective government should have is to seek the highest equitable value. The procedure in such a case would be to get the facts about values of the water rights needed for the necessary instream flows. Project these against long term flow records, and negotiate for purchase of those water rights. If negotiation fails then ordinary condemnation procedures should be followed to obtain the rights necessary for public use. Equity and law processes would combine in most cases to result in a jury determination as to the damages to be awarded for taking the water rights for public needs. The costs of the resulting award should be born by the State which violated the principle of equity in allowing over-appropriation of the stream.

Any equity text discusses the principles outlined here, and pursuing this cause is largely a matter of having the courage to pick out the particular factual situation and get the legal departments of government to do the job for the people who are paying their salaries. Stimulating lawyers to crusade, however, is one of the hardest things there is, particularly where they get paid whether they act or not. Moreover, all of the profit in the private practice of environmental law lies in the defense of environmentally damaging projects, so the people's lawyers in government are the only real hope.

SUMMARY

The application of equity will necessarily impact the western appropriation doctrine. The first in time is the first in right if carried to its extreme is clearly unjust. That is, to continue private rights to the last of our public water is socially immoral and legally inequitable. All administrative agencies of public waters should protect minimum stream flows needed in a river for the beneficial uses of fish and wildlife, recreation, aesthetics, navigation, and other uses. Failure to do this is a violation of the equitable trust under which government agencies are required to administer public resources for the benefit of the public interest. The utter selfishness of the private appropriator who would divert the last water from a stream must be henceforth constrained by law. Since many legislatures will not act, equity has to be advocated vigorously by other trustees for the public, i.e., government agencies.

THE FUTURE DEVELOPMENT OF WESTERN WATER LAW

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About 100 years ago western water law changed abruptly. Because of new societal needs and a distinctive climate in the west, the traditional riparian doctrine of the common law was discarded and the practices of the various Indian tribes were ignored or destroyed. Since then, although there have been a few modifications and refinements to western water law, it has seen relatively few major changes.

As western water law now enters its second century of development, there are increasingly vocal public demands that the law again go through significant reform. Because there can be little doubt that water law will change, it is extremely important that professionals in all areas of water resource planning and management anticipate the change. Not to do so will ensure that today's water resource planning will be absolutely useless during the coming century and beyond. Before considering the future, however, we may learn something by briefly reviewing the past. What happened when western water law made its last change? Why did those changes occur?

Riparian Doctrine Repudiated.

When white Americans moved west, they traveled light, bringing with them only their most valuable possessions. Of those, one of the most important was their system of government and law, which protected not only personal freedom but also property. Part of their law of property was the doctrine of riparian water rights, an approach to water allocation that had worked well in humid climates where there was plenty of water and where consumptive uses of water seldom interferred with non-consumptive uses.

Remembering that Americans in the West clung tenaciously to most if not all of the rest of their institutions, it would have taken urgent necessity to force a change in their water law. However, because of the arid western climate as well as intense societal needs, water law in the West was in fact changed. By court decisions, statutes, and state constitutions, the riparian doctrine was discarded because:

-- It limited the use of water to the owners of land (most of the early settlers were trespassers in the public lands or at best held only a possessory interest).

-- It limited the use of water to riparian land, being land which touched the stream, and only so long as that land was in the stream's watershed (much of the need for water in the early west occurred well away from the stream and often outside of its watershed).

-- It either discouraged the consumptive use of water or required that all consumptive uses be curtailed in times of shortage (most if not all of the uses of water in the early west were highly consumptive and required substantial capital investment which could easily be destroyed if shortages were shared with subsequent uses).

Adoption of the Appropriation Doctrine.

In place of the riparian doctrine, most of the western states adopted the prior appropriation doctrine which did not limit the use of water to owners of land, which did allow water to be used anywhere regardless of stream location, and which did give the first user the right to continue his use in spite of the needs of subsequent users. In other words, early western society drastically changed its water law to meet its very utilitarian needs, which continued to be all important until the last decade.

Today's Need for Change.

Today's pressures for change in water law are directly attributable to society's newly percieved needs. Total preoccupation with utilitarian or consumptive uses of water is no longer universal. Instead, major segments of our society are insisting that non-utilitarian values, particularly environmental quality and aesthetics as well as fish and wildlife, must be considered in water allocation decisions. In addition, many utilitarian users and their dependents are condemning the inflexibility of the prior appropriation doctrine which perpetuates senior uses of water which are of marginal social value, while curtailing very valuable but junior uses of water in times of drought.

In light of the fact that water rights are property rights, advocates for change are simply saying that both purposes of property law (certainty and justice) are not

being satisfied today by the prior appropriation doctrine. Certainty has been exalted to the detriment, and perhaps extinction, of justice. Proponents of change suggest that water law promotes injustice by ignoring the present needs of society.

What are the water allocation needs of today's society? In addition to providing for some certainty for the continuation of many valuable, long-term, utilitarian uses of water, flexibility is also needed to allow for the long-term, non-utilitarian uses of water (e.g., miminum stream and lake levels) as well as short-term utilitarian uses of water, such as in times of drought.

Western water law will probably change to meet these needs in two ways:

1. Tinkering, the modest refinement and modification of the existing prior appropriation doctrine; and

2. The adoption of startling new concepts of governmental regulation and management, making dramatic changes in the thrust and effect of the appropriation doctrine.

Before discussing future tinkering with the existing water law and before treating the more drastic governmental actions affecting water allocations, several disclaimers must be made. First, technological advances may mandate changes in water law which are beyond today's wildest dreams. Second, the changes prophesied in this paper are quite conclusory, unaccompanied by the detailed legal analysis which must be understood and accepted before one can rely on the changes suggested here. Third, due to time limitations, this paper does not directly address groundwater, the source of roughly one-fourth of our fresh water supplies and the subject of enumerable possible changes in the law. Finally, since this is a general paper, dealing with almost half of our country, important variations between the laws of the individual western states have been largely ignored in favor of broad generalizations suitable for a regional audience from throughout the west.

Future Change -- Tinkering.

Tinkering will probably take two forms: (1) expansion of the "public interest" concept, and (2) the severe re-definition of the term "beneficial use."

Public Interest

Many western states have either statutory or constitutional requirements that the "public interest" or some similar criteria be satisfied by the state allocation of water rights. In many states this criteria has either been ignored or given little consideration. In the future, we can expect the public interest to be given greater consideration -- a development which will be forced by legislation or litigation. It is important to remember, however, that the "public interest" may not always be consistent with environmental protection. For example, the public interest may be better served by economic activity that creates jobs or by the development of energy resources than it can be served by the protection of minimum stream flows or lake levels.

Beneficial Use

One of the fundamental concepts in the prior appropriation doctrine is that water rights may be awarded and may be exercised only for "beneficial uses." While the definition of beneficial use varies between the western states, a fairly safe generalization is that beneficial use does not include the "waste" of water.

The definition of waste, just as that of obscenity, depends on the eye of the beholder. We can expect, however, that waste will come to include such things as the less efficient forms of irrigation, the dilution of effluent, and the evaporation of effluent. On-the-other-hand, it is quite conceivable that waste may include those in-place uses of water which eliminate the diversion or impoundment of water for socially valuable purposes, such as municipal drinking supplies.

Future Change -- Governmental Regulation and Management.

While tinkering may be a satisfactory change in the determination of new water rights, in most states those determinations were made long ago and more drastic measures will be necessary. Those measures will probably focus on the governmental regulation and management of existing water rights.

In either case, while the needs of society may be changing, the basic powers of government are not. Since water law changes will doubtlessly result from governmental action, it is appropriate to examine the governmental powers upon which those actions will be based.

Governmental Powers.

The federal government is a government of enumerated powers. In other words, it enjoys only those powers which are specifically given to it in the Federal Constitution. Among the powers that the federal government might use to influence water allocation are those under the property clause and the commerce clause as well as the treaty power and the power to tax and spend. States, on the other hand, are governments of reserved or residual power in that they retain all powers which have not been given to the federal government or which have not been limited by the state constitutions. Among the state powers which might be used to effect water resource allocation are condemnation, taxation, spending, and police power regulation.

For years we have assumed that the individual states, and not the federal government, will dominate water resource allocations. Today we are not so certain and, in the future, we may well learn that the federal government is the primary level of government at which water allocation decisions are made. As will be indicated later, the federal government doubtlessly has the power to allocate water. The real question is, however, whether or not the federal government will wish to -- there are very real political obstacles to consider. Based on the recent remarks of Cecil D. Andrus, Secretary of the Interior, before the National Conference on Water in St. Louis during May, 1977, it would appear that the federal executive is itching to become involved:

> As for the states, I would hope that they could begin cooperative efforts to bring laws, rules and institutions governing water into the twentieth century. If this does not occur, eventually the federal government will be encouraged to step in, and another area of state prerogatives will be lost. As a former governor, I don't want to see that happen, and I do not propose any such drastic expansion of federal influence at this time. (emphasis added)

Federal Involvement.

If the federal government should choose to exercise its influence, however, we could expect it to act under the property clause, the commerce clause, and the treaty power as well as the power to tax and spend.

Property Clause

Under the property clause, the federal government has the power to manage its own property and adopt regulations

to protect that property. In the water area, the United States has vast holdings of what are called "reserved rights." These reserved rights are attached to all federal enclaves which were reserved or withdrawn, while still a part of the public domain, from entry and patent by private persons. More specifically, the reserved right has a priority date as of the date of reservation. In addition, the reserved right is for that amount of water necessary to carry out the purposes of the reservation.

These federal rights accompany such things as national forests, national parks, national wildlife areas, national monuments, etc. Through the establishment, quantification, and exercise of the reserved right, especially where it includes minimum stream flows and minimum lake levels, the United States will have a decisive say in how water resources in the west are allocated. In addition, since the federal government may impose regulations to protect its property, we may well see the regulation by the federal government of private rights created under state law in order to protect the federal water right.

Commerce Clause

Under the commerce clause, the United States has the power to regulate all activities which affect interstate commerce. Since interstate commerce includes navigation, the federal government has taken strong measures in the area of water quality through such efforts as the §404 and §10 permit programs. As the court decisions under the 1972 Federal Water Pollution Control Act Amendments indicate, however, the power to regulate commerce goes far beyond classically navigable waters to include the regulation of the quality of all water in the United States. Similarly, the commerce power could be used in a number of ways to effect water quantity allocations including, but not limited to, the regulation of coal slurry pipelines as well as the regulation of interbasin and interstate transfers of water.

Treaty Power

Under the treaty power, the federal government may enter into agreements or treaties with a foreign nation in order to allocate international water between the two countries. Once that allocation is made, it becomes a national obligation. In order to meet that obligation, the United States might well regulate the use of private rights, created under state law, in order to ensure that the national obligations under the compact are met.

Power to Tax and Spend

Finally, the United States has the power to tax and spend for the general welfare. As part of the power to spend, the federal government certainly has the power to impose conditions on the expenditure of funds or, viewed from the other standpoint, to attach strings to the receipt of federal funds. By so doing, the United States enjoys a tremendous opportunity to influence the allocation of water. For example, Secretary Andrus in his St. Louis speech suggested a number of ways in which this might be done:

-- Revision of the planning and evaluation criteria contained in the 1973 "principles and standards" of the Water Resources Council. Those standards, of course, are used to review Bureau of Reclamation and Corp of Engineer Projects. We can expect that the principles and standards will be revised to recognize policy changes:

> To ascertain the projects under construction, in the planning stage, are proposed in the future, will meet an actual need and give broad benefits to the public,
>
> To assure that there is no waste of tax money to benefit only a few,
>
> To assure that projects are safely designed, constructed, and operated,
>
> To guarantee that the people have meaningful input into the decision making process,
>
> To avert unnecessary environmental damage,
>
> To coordinate programs so that we can carry out a national policy and do not construct projects which benefit one sector or group while damaging another sector or group,
>
> To include water conservation as an objective for consideration along with national economic development and environmental quality objectives.

-- Require individual water meters for residences in all cities receiving water from federally-aided systems.

-- Set water efficiency requirements for irrigation uses for those receiving federal assistance in agriculture.

-- Establish water efficiency standards for various types of construction where federal funds are involved and where federal guarantees are made for the mortgages.

State Actions.

As mentioned before, the states are governments of residual or reserved powers having all those powers not enumerated in the Federal Constitution and not prohibited in state constitutions. The powers of the states are exercised either through a state-level agency or through the various political subdivisions of the state: special districts, counties, and municipalities. There are at least four powers which most states could use to manage or regulate water allocation decision making: condemnation, taxation, spending, and police power regulation.

Condemnation

As we all know, the power of eminent domain or condemnation may be used to acquire property for public purposes upon the paying of just compensation. While the requirement of compensation often makes condemnation prohibitively expensive, in those instances where sufficient money is available there are several opportunities for the states to act, including the use of water right banks and water use banks. Under a water right bank, a state or its political subdivision could purchase water rights and hold them until such time as a private user with a need for water consistent with state water policy would purchase the water right. Under the water use bank concept, the state would not condemn the entire water right, but would instead condemn only future uses of that water right, leaving the water right in private ownership for its present uses. The state would then hold the future uses of the water right until such time as a user might purchase those future uses for a purpose consistent with state water policy.

Taxation

Although all states enjoy the power to tax both real and personal property, few if any of the states have gone so

far as to single out water rights for special tax treatment. In many states, such an action would require constitutional amendment or additional statutory authority. Once that was done, however, states may well discourage certain uses of water by imposing severe taxes on those water rights which are used for purposes inconsistent with state water policy. In the alternative, of course, states might impose only a minimal or nominal tax in those water rights used for purposes which were in keeping with the state water policy.

Spending

As was the case with condemnation, if the states have sufficient money, they can spend it to encourage uses of water consistent with state water policy. For example, in a period of drought a state might simply pay a senior water right user not to exercise his water right for a year, so that downstream junior water right users would have water available to use for purposes consistent with state water policy.

Police Power Regulations

Police power regulations, unlike the exercise of the power to condemn or the power to spend, will cost the state very little money. Although politically unpopular, a valid police power regulation which limits the use of private property in order to protect and enhance the public health, safety, or general welfare, requires no compensation at all -- unless, however, the use of property is so restricted as to constitute a "taking." While the approaches described under "tinkering," above, are exercises of the police power, there are far more drastic measures which states might consider. For example, since a water right is an interest in real property, just as is land, we may see the imposition of water right zoning just as we have seen the imposition of zoning regulations on the use of land. Under a water right zoning scheme, the existing uses of water might be preserved (with all other uses permitted only with special permission) or treated as nonconforming uses to be amortized out of existence over a period of a few years.

Jurisdictional Balance.

As previously discussed, the historical initiative in the water allocation area has been enjoyed by state governments. Unless those governments begin to act, however, we can expect the federal government as well as local governments to become far more active. Unfortunately, state legislatures do not seem to be very aggressive -- by and large they are

conservative creatures unwilling to make substantial changes in the law. If this trend continues, it will be a sad day for water resource management in the West. If the federal government acts, we are quite likely to see the development of yet another inflexible bureaucracy which is simply unable to make adjustments and allowances for peculiar local conditions. In other words, any effort towards national uniformity in water resource management will ignore the drastically non-uniform conditions represented by western water supplies. Furthermore, if state governments do not act, local governments may well act in ways consistent only with very parochial local concerns, inconsistent with the best interests of the state or national populace. Consequently, the future development of water resource law in the West may be a sorry chapter in our nation's history: state governments, although the best equipped to deal with water allocation decisions, will sit on their hands while the federal government and local governments will make decisions which are out of step with reality or the national interest.

Water Allocation for Non-water Goals.

Many of us involved with water resource decision-making are convinced that the control of water is the ultimate tool in the struggle to maintain and enhance both economic development and environmental quality. We need to be aware that not everyone agrees with us -- especially those professionals dealing with the planning and regulation of land use. They maintain, supported by sound arguments, that only effective land use control is determinative of our country's future. Whether or not they are correct, we can expect that they will begin to see the allocation of water as an important technique in the control of land use. Consequently, if they have their way, we can expect to see water resource allocation goals subordinated to the goals associated with the proper use of land. While the two sets of goals may not be inconsistent, it is easy to see how they may. For example, a decision to stimulate economic development in a rural area may not be at all compatible with the preservation of minimum stream flows. In addition, the curtailment of diversions in order to dilute downstream effluent discharges may be quite inconsistent with the attempt to preserve irrigated agriculture which is so dependent on those diversions.

Conclusion.

The real question in the West is not whether water law is going to change but rather how it will change. We must keep in mind that changing the law, particularly where the law is represented by statutes or constitution, is a heavily

political process. There will be significant and powerful opposition to any change -- if for no other reason than those persons who now enjoy the benefits of present law will suffer economic loss.

With regard to change in the courts, however, the prospects become much less political. Unfortunately, the financial demands of prolonged litigation in order to accomplish a change in the law are tremendous. Only the most skillful lawyers and the most well-heeled clients can expect success. In addition, progress in the courts will also depend on those cases that are brought to trial. Where a "Frankenstein" case exists, a case in which traditional water law does grave injury to private parties as well as to the public, most courts will not hesitate to change the law. On the other hand, courts make law on only a case-by-case basis, without any attempt to accomplish comprehensive change. This inability of the courts to make anything but ad hoc revisions in the law, leave us at exactly the same point we began -- with the state legislatures.

When the state legislatures address the issue of change, they will be concerned with one overriding question: Who will pay for the change? Will it be the users of water under existing law who will see their rights severely curtailed? Or, will it be the public for whose benefit the change is to be made? Since water in the West does belong to the public and since private persons own only the right to periodically use it, the decision will not be easy. Once the question is answered, however, the nature of future change will become quite easy to predict.

Protecting Instream Flows Under Western Water Law: Discussion

by

Berton L. Lamb

Because of the nature of water resources in the West, the management issue of major concern has been certainty or predictability. In order to justify development, water users have required long term protection of their rights. This has led to the appropriation doctrine's rather inflexible rule of "first in time is first in right."

In recent times, additional, nonconsumptive water uses have been recognized. Among these are the instream uses of water for fish and wildlife, recreation, and other environmental values. These uses have raised new management issues. One management concern occasioned by these new uses is for flexibility. But the need for flexibility puts pressure on the current water rights system. Not only has state water law received pressure from environmentalists, but also from federal water quality laws, federal reserved rights, and Indian reserved rights. All of this exacerbates the problem of maintaining certainty in water rights management.

At this point, the works by White, Gould, and Bowler can be interjected. In the broad sense, Gould and Bowler suggest that western water law is currently flexible enough to allow successful argument of environmental protection cases. White tells us that "new" water law will evolve as a product of this flexibility. These are optimistic reports on the potential for protecting flows for

environmental purposes.

In some ways, all three papers beg the question of how the objective of protecting flows is to be accomplished. The implicit answer is that the ingredient for success is not only legal skill, but political will. Significantly, the will to act seems to be growing. As it grows, options under current law for protecting flows will become more viable. Moreover, as political will grows, the law will change. The prospects for change are illuminated in the papers presented in this publication.

Shortcomings in each of the papers revolve around the question of implementation. Gould, for example, would have the environmentalist convince the public of the value inherent in instream flows. Only after this is done will the legal system be effective in protecting these environmental values. While is it undoubtedly true that law tends to follow social consensus, it seems too simple to say that the public must be convinced. After all, there are many publics, not "a public." This is not really a process of "convincing," but should be properly seen as bargaining which occurs on a variety of fronts, using a variety of tools. As such, it is an ongoing process in which flows are not established once in perpetuity. Instream flows are established then defended.

Bowler's weaknesses are those of oversimplification. He is, no doubt, correct that the principles of equity can be applied to environmental protection. He is remiss, however, in not explaining how one selects a potentially successful case, and hedges his bets against an adverse decision by the judiciary.

One approach might be as follows: (1) pick a case in which the arguments for protecting instream flows are convincing on all grounds. The brief might then mention the principles of equity in a tangential manner. (2) Once this rationale has been accepted as part of a successful argument, the equity argument could be included as the primary argument in a case where the judge is inclined to favor instream flows but cannot decide on statutory grounds.

A discussion of how this process works in practice, how to define difficult concepts--like "public interest"-- and how to identify suitable cases would be most valuable. In fairness, however, Bowler has set forth the main ideas and the struggle over implementation will require adjustments to fit each jurisdiction.

Finally, White's paper is a convincing projection about the course of western water law. In light of the recent efforts by the Carter Administration to develop a comprehensive national water policy, it appears that White may be correct in his assessment that change is imminent. Even though the reader may be left wondering how changes supportive of instream flows can be effected, White's contribution to understanding the likely directions of change is invaluable. As with the other papers, knowledge gained here can lead to creative action suited to particular cases and aimed at developing the political will necessary to effect revisions in law.

Conclusion

The important point about all these papers is that given imaginative implementation, there are many potential strategies for protecting instream flows. Gould gives us an adequate summary of the "tinkering approach." Methods identified under this rubric are useful and productive. Bowler introduces an approach which complements any technique. However, the ability of an equity argument to stand alone is problematic. In White's paper we have some new approaches which seem to be fruitful, and within reach given our current skills in water management.

APPENDIX

Matrix of Strategies for Preserving Instream Flows with Reference to State Statutes

The matrix which follows consists of a list of strategies developed by Richard Dewsnup and Dallin Jensen. These strategies were developed pursuant to a contract with the U.S. Fish and Wildlife Service, Office of Biological Services, Western Energy and Land Use Team. Copies of the project report entitled "Identification, Description and Evaluation of Strategies for Reserving Flows for Fish and Wildlife" may be obtained from NTIS, or by writing to the following address:

Dr. Harvey R. Doerksen
Western Energy and Land Use Team
Rm. 206, Federal Building
Fort Collins, Colorado 80521
Re. Project 23

Summary of Strategies

A. Direct Legislative Action

1. Legislative protection of Scenic Rivers:
Both the federal government and some states have wild and scenic rivers programs. Stream flows are protected in these streams. States could develop their own program or add to existing protected streams.

2. Legislative Designation of Quality Streams:
States might designate some streams as very productive of fish. Such streams would be protected.

3. Statutory Moratorium on New Appropriations:
In order to provide time to study a stream or to organize water rights records, a state could temporarily refuse to grant new permits.

4. Legislative Definition of Navigability:
If a state legislature defines what is navigable, it may then protect those streams from depletion without paying compensation.

5. Legislative Assignment of Use Rights to a State Agency:
The legislature may directly authorize a state agency to appropriate a flow of water for a specific purpose. The agency would obtain a water right for the stated purpose.

B. Administrative or Agency Action

1. Direct Reservation of Instream Flows:
If the legislature has authorized it, or if the water rights system allows, an agency may reserve an amount of flowing water from further appropriation.

2. Administrative Moratorium on New Appropriations:
Because of confusion in water rights records or extensive demands on the resource, an agency could temporarily refuse to grant permits pending further study.

3. Statutory Criteria to Protect Instream Flows:
This strategy is based on legislation which contains criteria to guide the state water rights administrator when acting on applications to appropriate water.

4. Conditions on Water Use Permits:
An agency concerned with promoting efficient use could condition use of water upon meeting criteria which leaves water in the stream.

5. Conditions on Transfers:
An agency could condition the transfer of water use rights within or between basins to protect the public interest. One condition could be maintenance of adequate stream flow.

6. Conditions on Exchanges:
An agency could condition the exchange of water use rights within or between basins to protect the public interest. One condition could be maintenance of adequate stream flow.

7. Prohibitions on Transfers or Changes:
Under certain circumstances (e.g., if a stream were overappropriated) or under legislative direction, an agency could stop further transfers or changes. This might leave flowing water if senior users were downstream.

8. Permits for Limited Periods of Time:
In the public interest, an agency could limit the time of withdrawals and/or limit the life of the diversion.

9. Demanding Greater Diligence in Completing Appropriations:
The appropriate agency could void permits where would-be users have made only minimal efforts to perfect their rights.

10. Imposing More Stringent Burden of Proof on Large Appropriators:
Large users could be required to show a lack of environmental damage.

11. Instream Flow Protection Implied for Broad Statutory Criteria:
Statutes governing water rights administration customarily require the protection of flows or the protection of the public interest in granting rights. The administrator should take into account environmental values when granting permits.

12. Improvements in Water Records:
Improved records could help the administration know which streams are in danger of dewatering.

13. Appropriations by a State Agency:
If an agency has been authorized to do so, it may make application for, and hold water rights for instream flow purposes.

14. Appropriations held in Trust for Other Uses:
The state may appropriate water to itself and leave it flowing instream until such time as a designated future use is able to develop the resource.

15. Water Management Districts:
Some states have designated water management districts which plan and enforce water use rules including instream flow regimes.

16. Water Savings Practices:
Some states have instituted these practices.

17. Pumping Groundwater to Augment Stream Flow:
In some states, groundwater could be pumped to supply stream flow.

18. Weather Modification:
It is possible in many states to modify weather to provide additional rainfall resulting in increased flow.

19. Watershed Management:
States could adopt a total water management system in designated basins so that instream flows are considered on a par with other uses.

20. Intrastate Transbasin Diversions:
Transbasin diversions could be used to augment flows.

21. Acquisition and Reallocation of Water Rights:
Water rights could be taken by exercise of eminent domain and reallocated to instream uses in some states.

22. State Regulation of Navigation:
Under the state navigation servitude doctrine stream flows can be protected to maintain navigability.

C. Contractual Arrangements

1. Purchase of Conservation Pools:
Agencies could purchase storage for release in dry periods.

2. Purchase of Direct Flow Rights:
Agencies could buy flow rights and resell them downstream to maintain a flow.

3. Purchase Shares in Mutual Water Companies:
By purchasing shares, an agency could participate in decisions on operations of impoundments.

4. Lease Arrangements:
   Agencies could lease direct flow rights or storage space.

5. Interstate Compacts
   Some compacts may contain instream flow provisions.

D. Planning Programs

1. Statewide Water Plans:
   Water plans may include protecting environmental values.

2. Requiring Administrative Considerations of Statewide Water Plans:
   Action on such plans can be made mandatory.

3. Evolving Water Use Plans to Regulatory Status:
   Plans may become regulations in some states.

4. Section 208 Water Quality Plans:
   PL 92-500 requires chemical, biological and physical water quality be included in 208 areawide plans. Physical water quality is defined in terms of depth and velocity of flow.

5. Little NEPA (SEPA)
   Many states have SEPA which require attention to environmental values in all development plans.

6. State Fish and Wildlife Coordination Acts:
   These require interagency cooperation.

7. Industrial Siting Controls:
   These require protection of environmental values in authorizing industrial sites.

E. Judicial Doctrines and Procedures

1. Public Trust:
   The courts in some states have determined what action agencies must take to protect public trust.

2. Judicial Definition of Navigability:
   The state courts may have defined navigability so agencies could act to protect navigation.

3. Navigation Servitude and Rule of No Compensation:
   Water rights taken to protect navigation often do not constitute a "taking" and therefore, require no compensation.

4. General Adjudications:
   Becoming a party in these actions protects standing, clarifies rights, determines priority, and confirms rights. In addition, complaints about abandonment or inefficient use can be lodged.

5. Private Adjudication:
   More limited in scope than general adjudication, but has the same benefits.

F. Other Strategies and Techniques

1. Private Appropriations:
   A private person may obtain an instream flow right in some states.

2. Use of Federal Funding Programs:
   Some federal aid funds for the U.S. Fish and Wildlife Service may be used by states to purchase direct flow rights or storage.

3. Protection of Streambeds:
   In some states, the state owns the streambed and protects it with a flow of water.

4. Dams and Obstructions:
   Construction of impoundments can sometimes be used to augment flows.

G. Strategies Arising Under Water Quality Control Programs

This refers to connecting the notion of quantity with water quality management.

IDENTIFICATION OF STRATEGIES	Arizona	California	Colorado	Idaho	Montana	Nevada
A. DIRECT LEGISLATIVE ACTION						
1. Legislative Protection of Scenic Rivers	NP	Calif. Public Resources Code § 5093.50 et. seq.	-	Id. Code § 67-4301 et. seq.	NP	NP
2. Legislative Designation of Quality Streams	NP	-	NP	NP	NP	Nev. Rev. Stat. § 535.080
3. Statutory Moratorium on New Appropriations	NP	NP	NP	NP	Rev. Codes of Mont. §§ 89-8-103,104,105, 106	NP
4. Legislative Definition of Navigability	NP	Cal. Harb. and Nav. Code § 50 et. seq., 100, 101 et. seq.	NP	Id. Code § 36-1601(a), (b)	Rev. Codes of Mont. §§ 89-501, 89-601 et. seq.	Nev. Rev. Stat. §§ 537.010, 537.020, 537.030
5. Legislative Assignment of Use Rights to a State Agency	NP	NP	NP	NP	NP	NP
B. ADMINISTRATIVE OR AGENCY ACTION						
1. Direct Reservation of Instream Flows	NP	-	-	-	Rev. Codes of Mont. § 89-890, § 89-101. 2	-
2. Administrative Moratorium on New Appropriations	NP	NP	NP	NP	-	NP
3. Statutory Criteria to Protect Instream Values	Ariz. Rev. Stat. § 45-102,143, 147	Calif. Water Code §§ 123 et. seq., 150 et. seq., 174 et. seq., 1243, 1253-5, 1257-8, 1260, 1460	Colo. Rev. Stat. §§ 37-92-201, (Colo. Const. Art. XVI § 6) 37-80-102, et. seq. 37-92-203 et. seq., 37-92-401, 37-90-101 et. seq.	NP	Rev. Codes of Mont. §§ 89-885, 89-890	Nev. Rev. Stat. § 533.370
4. Conditions on Water Use Permits	Ariz. Rev. Stat. § 45-143	Calif. Water Code §§ 1243, 1253,1255,1257	Colo. Rev. Stat. § 37-92-305 et. seq.	Id. Code §§ 42-203,204, 1734,1801 et. seq. Id. Const. Act. 15 § 7	Rev. Codes of Mont. § 89-886 (1)	NP

IDENTIFICATION OF STRATEGIES	Arizona	California	Colorado	Idaho	Montana	Nevada
5. Conditions on Transfers	Ariz. Rev. Stat. § 45-172	Calif. Water Code § 1700 et. seq.	Colo. Rev. Stat. § 37-92-305	Id. Code §§ 42-108, 42-222	Rev. Codes of Mont. § 89-892	Nev. Rev. Stat. § 533.370
6. Conditions on Exchanges	NP	-	Colo. Rev. Stat. §§ 37-83-101, 37-83-104, 37-92-305	Id. Code §§ 42-105, 42-240	Rev. Codes of Mont. § 89-891.1	NP
7. Prohibitions on Transfers and Changes	NP	NP	NP	NP	Rev. Codes of Mont. § 89-892 (3)	NP
8. Permits for Limited Periods of Time	NP	Calif. Water Code § 1425 et. seq.	NP	Id. Code §§ 42-203,204	Rev. Codes of Mont. § 89-886 (1)	Nev. Rev. Stat. § 534.120
9. Demanding Greater Diligence in Completing Appropriations	-	Calif. Water Code § 1395 et. seq., § 1410	Colo. Rev. Stat. § 37-92-301(4)	Id. Code § 42-204	Rev. Codes of Mont. § 89-887, 887(2)	Nev. Rev. Stat. §§ 533.390, 533.395
10. Imposing More Stringent Burden of Proof on Large Appropriations	Ariz. Rev. Stat. § 45-146	NP	NP	Id. Code § 42-202, § 42-1737	Rev. Codes of Mont. §§ 89-885(6), 89-8-102.2	Nev. Rev. Stat. § 533.375
11. Instream Flood Protection Impled From Broad Statutory Criteria	-	-	NP	Id. Code §§ 42-203, 42-204, 42-1737	Rev. Codes of Mont. § 89-885	-
12. Improvements in Water Records	Ariz. Rev. Stat. § 45-181 et. seq.	Calif. Water Code § 5100 et. seq.	Colo. Rev. Stat. § 37-92-401 et. seq.	Id. Code § 42-225	Rev. Codes of Mont. §§ 89-880,870 et. seq.	Nev. Rev. Stat. §§ 533.385, 533.000, 534.170
13. Appropriations by a State Agency	Ariz. Rev. Stat. § 45-141, § 17-241	Calif. Water Code § 10500 et. seq.	Colo. Rev. Stat. § 37-92-102(3), § 37-92-103(4), 37-60-106 et. seq., § 33-1-112	Id. Code § 42-1734 et. seq.	Rev. Codes of Mont. §§ 89-102,125,3414; § 26-104.6	Nev. Rev. Stat. §§ 533.010, 533.325
14. Appropriations Held in Trust for Other Uses	NP	-	Colo. Rev. Stat. § 37-60-106 et. seq.	-	Rev. Codes of Mont. § 89-890	NP
15. Water Management Districts	NP	Calif. Water Code, Vols. 69,70,70A and Appendix	Colo. Rev. Stat. Chs. 37-46,47, 48, § 37-45-101 et. seq.	NP	Rev. Codes of Mont. § 89-3402(2)	NP
16. Water Savings Practices	Ariz. Rev. Stat. § 45-101	Calif. Const., Art. XIV; Calif. Water Code §§ 100, 101,275,461	Colo. Rev. Stat. § 37-92-103(4)	Id. Code § 42-104	Rev. Codes of Mont. §§ 89-101.2(1), 89-897	Nev. Rev. Stat. §§ 533.460, 533.035
17. Pumping Groundwater to Augment Stream Flow	NP	See Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1903).	Colo. Rev. Stat. § 37-92-102, § 37-92-103(4)	NP	Rev. Codes of Mont. § 89-2911(d)	NP

IDENTIFICATION OF STRATEGIES	Arizona	California	Colorado	Idaho	Montana	Nevada
18. Weather Modification	Ariz. Rev. Stat. § 45-2401 et. seq.	Calif. Water Code § 400 et. seq.	Colo. Rev. Stat. § 36-20-101 et. seq.	Id. Code §§ 22-4301 et. seq., 22-4302	Rev. Codes of Mont. § 89-310 et seq., Mont. Const., Art. IX § 3(3)	Rev. Rev. Stat. § 544.010 et. seq.
19. Water Shed Management	Ariz. Rev. Stat. §§ 45-506, 45-2001 et. seq.	Calif. Water Code § 12840 et. seq., § 12850 et. seq.	NP	Id. Code § 42-3701 et. seq.	NP	Rev. Rev. Stat. §§ 542,548
20. Intrastate Transbasin Diversions	Ariz. Rev. Stat. § 45-172	Calif. Water Code §§ 108, 232,10505 and 11460 et. seq.	Colo. Rev. Stat. § 87-82-106, § 37-60-115	NP	NP	NP
21. Acquisition and Reallocation of Water Rights	-	-	-	-	-	-
22. State Regulation of Navigation	Ariz. Rev. Stat. § 13-601	-	NP	Id. Code, Title 70, Ch. 11-20, Id. Code §§ 70-201,301, 401,501	Rev. Codes of Mont. §§ 89-3703,3704	-
C. CONTRACTUAL ARRANGEMENTS						
1. Purchase of Conservation Pools	Ariz. Rev. Stat. § 17-231(B) and § 17-241	Calif. Fish and Game Code § 1345 et. seq.	Colo. Rev. Stat. § 33-1-112	Id. Code § 36-104(F)	Rev. Codes of Mont. § 26-104.6	Rev. Rev. Stat. § 501.181
2. Purchase of Direct Flow Rights	Ariz. Rev. Stat. § 45-172	-	Colo. Rev. Stat. § 33-1-112	Id. Code § 36-104(7)	Rev. Codes of Mont. §§ 89-125, 89-3414 (8), 26-104.6	-
3. Purchase of Shares in Mutual Water Companies	-	-	-	Id. Code § 36-104(7)	-	Rev. Rev. Stat. § 501.181
4. Lease Arrangements	Ariz. Rev. Stat. § 17-241	-	Colo. Rev. Stat. § 33-1-112	Id. Code § 36-104(7)	-	-
5. Interstate Compacts	Ariz. Rev. Stat. § 45-506	-	Colo. Rev. Stat. § 37-60-109, § 37-60-104	Id. Code §§ 42-1734(d), 42-1805	Rev. Codes of Mont. § 89-142	Rev. Rev. Stat. Ch. 538
D. PLANNING PROGRAMS						
1. Statewide Water Plans	Ariz. Rev. Stat. § 45-2501 et. seq.	Calif. Water Code §§ 10004, 11200, 11900 et. seq.	Colo. Rev. Stat. § 37-60-115, § 37-60-116	Idaho Const., Art. 15 § 7 Id. Code § 42-1734(b)	Rev. Codes of Mont. § 89-132.1	Rev. Rev. Stat. § 532.165
2. Requiring Administrative Consideration of Statewide Water Plans	NP	Calif. Water Code § 11900 et. seq.	Colo. Rev. Stat. § 37-60-123	Id. Code §§ 42-1734, 42-1756	Rev. Codes of Mont. § 89-132.1(3)	Rev. Rev. Stat. § 532.165

IDENTIFICATION OF STRATEGIES	Arizona	California	Colorado	Idaho	Montana	Nevada
3. Evolving Water Use Plans to Regulatory Status	NP	Calif. Water Code § 1256	-	-	-	-
4. Section 208 Water Quality Plans	Ariz. Rev. Stat. § 36-1852	Calif. Water Code § 13140 et. seq.	Colo. Rev. Stat. § 25-8-201 et. seq.	Id. Code § 39-104 et. seq.	Rev. Codes of Mont. § 69-4801 et. seq.	Nev. Rev. Stat. § 445.131 et. seq.
5. Little NEPAs (SEPAs)	NP	Calif. Pub. Res. Code § 2100 et. seq.	NP	NP	Rev. Codes of Mont. § 69-6501 et. seq.	NP
6. State Fish and Wildlife Coordination Acts	Ariz. Rev. Stat. § 17-231(C)	Calif. Fish and Game Code § 1601 et. seq., 1602	Colo. Rev. Stat. § 33-5-101 et. seq.	NP	Rev. Codes of Mont. § 26-1501 et. seq.	NP
7. Industrial Siting Controls	-	Cal. Pub. Res. Code § 25500	Colo. Rev. Stat. § 24-65.1-101 et. seq.	-	Rev. Codes of Mont. § 70-801 et. seq.	-
E. JUDICIAL DOCTRINES AND PROCEEDINGS						
1. Public Trust	-	See: People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Malton v. City of Long Beach, 44 Cal. 2d 199, 282 P. 2d 481 (1955)	-	See: Southern Idaho Fish and Game Ass'n. v. Picabo Livestock, Inc., 96 Id. 360, 528 P. 2d 1295 (1974)	-	-
2. Judicial Definition of Navigability	-	See: People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971)	-	Id. Code § 36-1601(a)	-	-
3. Navigation Servitude and Rule of No Compensation	-	See: Colberg, Inc. v. State of Calif., 67 Cal. 2d 408, 432 P. 2d3 (1967)	-	-	-	-
4. General Adjudications	Ariz. Rev. Stat. §§ 45-231 to 45-245	Calif. Water Code § 2500 et. seq.	Colo. Rev. Stat. § 37-92-301 et. seq.	Id. Code § 42-1406 et. seq.	Rev. Codes of Mont. § 89-870 et. seq.	Rev. Rev. Stat. §§ 533.090 to 533.185
5. Private Adjudications	-	-	-	-	-	-
F. OTHER STRATEGIES AND TECHNIQUES						
1. Private Appropriations	Ariz. Rev. Stat. § 45-141 § 45-142 § 45-147	Calif. Water Code § 1257	Colo. Rev. Stat. § 37-92-103	Id. Code § 42-212	Rev. Codes of Mont. § 89-867(2)	Rev. Rev. Stat. § 533.030

IDENTIFICATION OF STRATEGIES	Arizona	California	Colorado	Idaho	Montana	Nevada
2. Use of Federal Funding Programs	Ariz. Rev. Stat. § 17-402	Cal. Fish and Game Code §§ 400,401	Colo. Rev. Stat. §§ 37-60-118, 32-2-104, 33-2-105	Id. Code §§ 36-1802, 67-4223	Rev. Codes of Mont. § 26-1401	Nev. Rev. Stat. §§ 501.115 501.117
3. Protection of Streambeds	NP	Calif. Water Code § 7047; Cal. Pub. Res. Code §§ 27400, 27401, Cal. Fish and Game Code § 6565	-	Id. Code § 42-3801 et. seq.	-	Nev. Rev. Stat. § 503.425
4. Dams and Obstructions	NP	Calif. Water Code §§ 6500, 6501, Cal. Fish and Game Code § 5930 et. seq.	Colo. Rev. Stat. § 37-87-101 et. seq.	Id. Code § 36-905	Rev. Codes of Mont. § 26-104.5	Nev. Rev. Stat. §§ 535.20, 535.100
G. STRATEGIES ARISING UNDER WATER QUALITY CONTROL PROGRAMS	Ariz. Rev. Stat. § 36-1851 § 36-1852 § 36-1854 § 36-1869	Calif. Water Code § 13020 et. seq.	Colo. Rev. Stat. § 25-8-101 et. seq.	Id. Code § 39-108 et. seq.	Rev. Codes of Mont. § 89-4801 et. seq.	Nev. Rev. Stat. §§ 445.131 et. seq.

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	IDENTIFICATION OF STRATEGIES
							A. DIRECT LEGISLATIVE ACTION
NP	No. Dak. Cent. Code § 61-29-03, § 61-29-04, § 69-29-06	Ore. Rev. Stat. Ch. 538, Ore. Rev. Stat § 390 390.805 et.seq.	So. Dak. Cod. Laws §§ 46-17A-15, 46-17A-20, 46-17A-21	NP	NP	Wyo. Stat. §§ 41-1.12 to 41-1.17	1. Legislative Protection of Scenic Rivers
NP	NP	-	NP	NP	Rev. Code of Wash. §§ 75.20.020, 75.20.030, 75.20.010	Wyo. Stat. § 41-1.14	2. Legislative Designation of Quality Streams
NP	NP	NP	NP	NP	NP	NP	3. Statutory Moratorium on New Appropriations
NP	No. Dak. Cent. Code § 61-15-01	Ore. Rev. Stat. Ch. 776-78,780, 783, Ore. Rev. Stat. §§ 274.029, 274.005 et. seq.	NP	NP	Rev. Code of Wash. Chs. 12, 88,91	NP	4. Legislative Definition of Navigability
NP	No. Dak. Cent. Code §§ 61-02-04, 61-02-14, 61-02-29, 60-02-30	NP	NP	NP	NP	NP	5. Legislative Assignment of Use Rights to a State Agency
NP	No. Dak. Cent. Code § 61-15-09, § 61-02-14	Ore. Rev. Stat. §§ 538.008 et. seq., 536.300, 336.360, 536.340, 536.410	So. Dak. Cod. Laws §§ 46-17-1, 46-17-4, 46-17-5.1	NP	Rev. Code of Wash. §§ 90.22.020, 90.22.010, 90.22.030	Wyo. Stat. § 41-29-2	
							B. ADMINISTRATIVE OR AGENCY ACTION
NP	NP	Ore. Rev. Stat. § 536.410	So. Dak. Cod. Laws § 46-5-41	Utah Code Ann. § 73-6-1, § 73-6-2	Rev. Code of Wash. § 90.54.050	NP	1. Direct Reservation of Instream Flows
							2. Administrative Moratorium on New Appropriations
NP	No. Dak. Cent. Code § 61-04-07	Ore. Rev. Stat. § 537.130, § 537.170	So. Dak. Code Laws § 46-5-18	Utah Code Ann. § 73-3-8	Rev. Code of Wash. §§ 90.54.020, 75.20.050	Wyo. Stat. § 41-1.9	3. Statutory Criteria to Protect Instream Values

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	
New Mex. Stat. §§ 75-5-5, 75-5-6	No. Dak. Cent. Code § 61-04-07.1	-	NP	Utah Code Ann. § 73-3-8	Rev. Code of Wash. §§ 90.03.290, 90.22.030	Wyo. Stat. § 41-203	4. Conditions on Water Use Permits
New. Mex. Stat. §§ 75-5-22, 75-5-23	No. Dak. Cent. Code § 61-04-15	Ore. Rev. Stat. § 540-510 et. seq.	NP	Utah Code Ann. § 73-3-3	Rev. Code of Wash. § 90.03.380	Wyo. Stat. § 41-4.1	5. Conditions on Transfers
New Mex. Stat. § 75-5-24	NP	-	NP	Utah Code Ann. § 73-3-20	NP	Wyo. Stat. § 41-5	6. Conditions on Exchanges
NP	NP	NP	NP	NP	NP	NP	7. Prohibitions on Transfers and Changes
New Mex. Stat. §§ 75-5-5, 75-5-6, 75-40-1 et. seq.	No. Dak. Cent. Code § 61-04-07.1	Ore. Rev. Stat. § 537.190	-	Utah Code Ann. § 73-3-8	Rev. Code of Wash. § 90.03.250	NP	8. Permits for Limited Periods of Time
New Mex. Stat. §§ 75-5-5, 75-5-7, 75-5-13	No. Dak. Cent Code § 61-04-06, § 61-04-14	Ore. Rev. Stat. § 537.230	So. Dak. Code Laws §§ 46-5-25, 46-5-26	Utah Code Ann. § 73-3-12	Rev. Code of Wash. § 90.03.320	Wyo. Stat. § 41-206	9. Demanding Greater Diligence in Completing Appropriations
New Mex. Stat. § 75-5-1	NP	Ore. Rev. Stat § 537.160	So. Dak. Code Laws §§ 46-5-20.1, 46-5-11	NP	NP	NP	10. Imposing More Stringent Burden of Proof on Large Appropriations
New Mex. Stat. § 75-5-6	-	-	So. Dak. Code Laws § 46-5-18	See Prelim. Draft Rules to Supp. Rules Utah St. Eng. (1974)	Rev. Code Wash. § 90.03.290	Wyo. Stat. § 41-203	11. Instream Flood Protection Implied From Broad Statutory Criteria
New Mex. Stat. § 75-4-1 et. seq.	No. Dak. Cent. Code § 61-03-15 et. seq.	-	So. Dak. Code Laws § 46-10-1 et. seq.	Utah Code Ann. § 73-4-1 et. seq.	Rev. Code Wash. § 90.14.010 et. seq.	Wyo. Stat §§ 41-154, 41-159, 41-165	12. Improvements in Water Records
New Mex. Stat § 75-5-1	-	Ore. Rev. Stat § 496.080 et. seq.	-	NP	-	Wyo. Stat §§ 41-1.42, 41-1.44, 41-1.46, 41-1.45	13. Appropriations by a State Agency
NP	NP	Ore. Rev. Stat § 536.410	So. Dak. Code Laws §§ 46-5-38, 46-5-39	Utah Code Ann. § 73-10-1 et. seq., 73-10-19	Rev. Code Wash § 90.54.050	-	14. Appropriations Held in Trust for Other Uses

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	
NP	No. Dak. Cent. Code § 61-16-11	Ore. Rev. Stat. ch 545 to 554	So. Dak. Code Laws § 46-18-1 et. seq.	Utah Code Ann. § 73-9-1 et. seq.	NP	Wyo. Stat § 41-77 et. seq.	15. Water Management Districts
New Mex. Const Art XVI New Mex. Stat. § 75-5-17,26	No. Dak. Cent. Code § 61-01-02, § 61-04-17	Ore. Rev. Stat. § 536.310	So. Dak. Code Laws §§ 46-1-8, 46-5-37	In re Water Rights of Escalante Valley Drainage Area, 10 U. 2d 77,348 P. 2d 679 (1960)	Rev. Code Wash. § 90.03.010 et. seq.	Wyo. Stat. § 41-2, § 41-1.22	16. Water Savings Practices
NP	NP	-	So. Dak. Code Laws §§ 46-17-1, 46-17-16	NP	Rev. Code of Wash. §§ 90.54.020, 90.44.020, et. seq.	NP	17. Pumping Groundwater to Augment Stream Flow
New Mex. Stat. § 75-37-1 et. seq.	No. Dak. Cent. Code § 2-07-1 et. seq.	Ore. Rev. Stat. § 558.010 et. seq.	So. Dak. Code Laws § 38-9-1, et. seq.	Utah Code Ann. § 73-15-3 et. seq. § 73-15-3, § 73-15-4	Rev. Code of Wash. § 43.30.010 et. seq.	Wyo. Stat. § 9-267, et. seq.	18. Weather Modification
NP	No. Dak. Cent. Code § 61-16-01 et. seq.	Ore. Rev. Stat. § 553.010 et. seq.	So Dak. Code Laws § 46-24-1 et. seq.	NP	Rev. Code of Wash. § 89.08.220	Wyo. Stat. § 41-354.2	19. Water Shed Management
NP	No. Dak. Cent. Code § 61-02-14	NP	NP	-	NP	NP	20. Intrastate Transbasin Diversions
-	No. Dak. Cent. Code § 61-02-22	-	-	-	Rev. Code of Wash. § 90.03.040	-	21. Acquisition and Reallocation of Water Rights
NP	No. Dak. Cent. Code § 61-15-02	-	So. Dak. Code Laws § 46-46-1	Utah Code Ann. § 65-1-14	-	NP	22. State Regulation of Navigation
New Mex. Stat. § 53-1-8	No. Dak. Cent. Code § 61-02-22, § 20.1-02-04, 20.1-02-05	Ore. Rev. Stat. § 496.146	So. Dak. Code Laws §§ 41-2-19, 41-3-1	Utah Code Ann. § 23-21-1	Rev. Code of Wash. § 77.12.010 et. seq.	Wyo. Stat. § 23-1.10, § 9-160.38	C. CONTRACTUAL ARRANGEMENTS 1. Purchase of Conservation Pools
New Mex. Stat. § 53-1-8	-	Ore. Rev. Stat. § 496.146	-	Utah Code Ann. § 23-21-1	Rev. Code of Wash. § 77.12.010 et. seq.	Wyo. Stat. § 23-1.10	2. Purchase of Direct Flow Rights

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	
-	No. Dak. Cent. Code § 61-01-18, repealed by S.L. 1975, ch 106 § 673	-	-	Utah Code Ann. § 73-1-19	-	-	3. Purchase of Shares in Mutual Water Companies
New Mex. Stat. § 75-40-1 et. seq.	No. Dak. Cent. Code § 61-02-22	-	-	Utah Code Ann. § 23-21-1	Rev. Code of Wash. § 77.12. 010 et. seq.	Wyo. Stat. § 23.1.10	4. Lease Arrangements
New Mex. Stat. § 75-33-1 et. seq.	No. Dak. Cent. Code § 61-23-01	Ore. Rev. Stat. § 536.420	So. Dak. Code Laws, § 46-30-1 et. seq. 46-29-1 et. seq.	Utah Code Ann. §§ 73-12a-2, 73-13-10, 73-16-2	Rev. Code of Wash. § 90.54. 010 et. seq.	Wyo. Stat. § 41-48.1	5. Interstate Compacts
New Mex. Stat. § 75-34-1 et. seq., § 4-20-3	No. Dak. Cent. Code § 61-02-28	Ore. Rev. Stat. § 536.310	So. Dak. Code Laws, § 46-17A-14, § 46-17A-17.1, § 46-17A-15	Utah Code Ann. §§ 73-10-15, 73-10-19	Rev. Code of Wash. § 43.27A. 090 § 90.54.020	Wyo. Stat. §§ 41-1.18, 41-1.20	D. PLANNING PROGRAMS 1. Statewide Water Plans
NP	No. Dak. Cent. Code § 61-04-02 et. seq.	Ore. Rev. Stat. § 536.350 et. seq.	So. Dak. Code Laws § 46-17A-15	-	Rev. Code of Wash. §§ 90. 54.040, 90.54. 060, 90.54.090	Wyo. Stat. § 41-1.21	2. Requiring Administrative Consideration of Statewide Water Plans
NP	-	-	-	NP	-	-	3. Evolving Water Use Plans to Regulatory Status
New Mex. Stat. § 75-39-1 et. seq.	No. Dak. Cent. Code § 1-20-04 (12)	Ore. Rev. Stat. § 468.005 et. seq.	-	Utah Code Ann. § 26-15-1 et. seq.	Rev. Code of Wash. § 90. 48.010 et. seq.	Wyo. Stat. § 35-502.18 et. seq.	4. Section 208 Water Quality Plans
NP	NP	NP	NP	-	Rev. Code of Wash. § 43. 21C 010 et. seq.	NP	5. Little NEPAs (SEPAs)
NP	NP	NP	NP	NP	-	Wyo. Stat. § 35-502.84	6. State Fish and Wildlife Coordination Acts
NP	-	Ore. Rev. Stat. § 469.010 et. seq.	-	-	Rev. Code of Wash. § 80.50. 010, § 90.62. 010 et. seq.	Wyo. Stat. §§ 35-502. 78, 35-502. 81, 35-502. 87	7. Industrial Siting Controls

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	
See: State V. Red River Valley Co., 51 N. M. 207, 182 P.2d 421 (1945)	-	See: Luscher V. Reynolds, 153 Ore. 625, 56 P. 2d 1158 (1936); Thornton V. Hay, 254 Ore. 584, 462 P.2d 671 (1969)	See: Flisrand V. Madson, 355. D. 457, 152 N. W. 786 (1913)	See: State V. Rollo, 71 Utah 91, 262 Pac. 987 (1927)	See: Kemp V. Putnam, 27 Wash. 2d 530. 208 P.2d 839 (1955), Wilbour V. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969)	See: Day V. Armstrong, 362 P.2d 137 (1961)	E. JUDICIAL DOCTRINES AND PROCEEDINGS 1. Public Trust
See: Wreyford V. Arnold, 82 N.M. 156, 477 P.2d 332 (1970)	See: State V. Brace, 76 N.D. 314, 36 N.W. 2d 330 (1949), Ozark-Mahoning Co. V. State, 76 N.D. 464, 37N.W. 2d 468 (1949)	See: Luscher V. Reynolds, 153 Ore. 625, 56 P. 2d 1158 (1936); Oregon V. Corvallis Sand and Gravel Co., 272 Ore. 545, 536 P. 2d 517 (1975)	See:Flisrand V. Madison, 35 S.D. 457, 152 N.W. 786 (1913) and Hillebrand V. Knapp, 65 S.D. 414, 274 N.W. 821 (1937)	See: Utah State Road Commission V. Hardy Salt Co., 23 U.2d 143, 486 P.2d 391 (1971)	See: Kemp V. Putnam, 27 Wash. 2d 530, 288 P.2d 839 (1955)	See: Day V. Armstrong, 362 P.2d 137 (1961)	2. Judicial Definition of Navigability
-	-	-	-	-	-	-	3. Navigation Servitude and Rule of No Compensation
New Mex. Stat. § 75-4-2 et. seq.	No. Dak. Cent. Code § 61-33-15 et. seq.	Ore. Rev. Stat. § 539.010 et. seq.	So. Dak. Code Laws, § 46-10-1 et. seq.	-	Rev. Code of Wash. § 90.03. 110	Wyo. Stat. § 35-184 et. seq.	4. General Adjudications
-	-	-	-	-	-	-	5. Private Adjudications
See: State V. Red River Valley Co., 51 N. M. 207, 182 P.2d 421 (1945)	No. Dak. Cent. Code § 61-04-02 § 61-01-01.1	Ore. Rev. Stat. § 536.300	NP	-	Rev. Code of Wash. § 90.54. 020	NP	F. OTHER STRATEGIES AND TECHNIQUES 1. Private Appropriations
New Mex. Stat. §§ 53-1-14, 53-1-15	No. Dak. Cent. Code § 61-15-03	Ore. Rev. Stat. § 496.525	So. Dak. Code Laws, § 41-2-31	-	Rev. Code of Wash. § 90.54. 070, § 90.48. 153, § 77.12. 440	Wyo. Stat. §§ 41-1.7, 23-1.21, 23-1.22	2. Use of Federal Funding Programs
NP	No. Dak. Cent. Code § 61-04-14	Ore. Rev. Stat. § 541.605 et. seq.	NP	Utah Code Ann. § 73-3-29	Rev. Code of Wash. § 75.20. 100, § 76.03. 280, § 76.42. 060	NP	3. Protection of Streambeds
NP	No. Dak. Cent. Code § 61-02-20	Ore. Rev. Stat. § 498.268, § 509.600 et. seq. § 498.248	NP	NP	Rev. Code of Wash. § 75.20. 060, § 75.20. 090, § 75.20. 061, § 90.24. 010, § 90.20. 020, § 90.24. 050	NP	4. Dams and Obstructions

New Mexico	North Dakota	Oregon	South Dakota	Utah	Washington	Wyoming	
New Mex. Stat. § 75-39-1 et. seq.	No. Dak. Cent. Code § 61-28-01	Ore. Rev. Stat. § 468.700 et. seq.	So. Dak. Code Laws, §§ 46-25-33, § 46-25-45 et. seq. 46-25-28	1. Institutional arrangements Utah Code Ann. SS 73-14-1, 2, 3, 4, 5, 6	Rev. Code of Wash. § 90.48.010 et. seq.	Wyo. Stat. § 35-502.16 et. seq.	G. STRATEGIES ARISING UNDER WATER QUALITY CONTROL PROGRAMS

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INSTREAM FLOW INFORMATION PAPERS ISSUED

1. Lamb, Berton Lee, Editor. Guidelines for Preparing Expert Testimony in Water Management Decisions Related to Instream Flow Issues. Fort Collins, Colorado, Cooperative Instream Flow Service Group, July 1977, 30 pages. (NTIS Accession Number: PB 268 597; Library of Congress Catalog Card No. 77-83281).

2. Lamb, Berton Lee, Editor. Protecting Instream Flows Under Western Water Law: Selected Papers. Fort Collins, Colorado, Cooperative Instream Flow Service Group, September 1977, 60 pages. (NTIS Accession Number: PB ; Library of Congress Catalog Card No. 77-15286).

The Biological Services Program was established within the U.S. Fish and Wildlife Service to supply scientific information and methodologies on key environmental issues which have an impact on fish and wildlife resources and their supporting ecosystems. The mission of the Program is as follows:

1. To strengthen the Fish and Wildlife Service in its role as a primary source of information on national fish and wildlife resources, particularly with respect to environmental impact assessment.

2. To gather, analyze, and present information that will aid decisionmakers in the identification and resolution of problems associated with major land and water use changes.

3. To provide better ecological information and evaluation for Department of the Interior development programs, such as those relating to energy development.

Information developed by the Biological Services Program is intended for use in the planning and decisionmaking process, to prevent or minimize the impact of development on fish and wildlife. Biological Services research activities and technical assistance services are based on an analysis of the issues, the decisionmakers involved and their information needs, and an evaluation of the state-of-the-art to identify information gaps and determine priorities. This is a strategy to assure that the products produced and disseminated will be timely and useful.

Biological Services projects have been initiated in the following areas:

Coal extraction and conversion

Power plants

Geothermal, mineral, and oil shale development

Water resource analysis, including stream alterations and western water allocation

Coastal ecosystems and Outer Continental Shelf development.

Systems and inventory, including National Wetlands Inventory, habitat classification and analysis, and information transfer

The Program consists of the Office of Biological Services in Washington, D.C., which is responsible for overall planning and management; National Teams which provide the Program's central, scientific and technical expertise, and which arrange for contracting of Biological Services studies with States, universities, consulting firms, and others; Regional staff who provide a link to problems at the operating level; and staff at certain Fish and Wildlife Service research facilities who conduct in-house research studies.